

Nos. 18-1686/18-1711

**In the United States Court of Appeals
for the Sixth Circuit**

AIRGAS USA, LLC,
Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent Cross-Petitioner.

On Appeal from the National Labor Relations Board

APPENDIX OF PETITIONER CROSS-RESPONDENT

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Nos. 18-1686/18-1711

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CERTIFICATION

Pursuant to 6 Cir. R. 30(b)(4)(E), I certify that all documents included in the Appendix are copies of documents that are properly part of the record.

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PROOF OF SERVICE

I certify that on the 14th day of September 2018, pursuant to 6 Cir. R. 25, I electronically filed this Appendix with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all parties indicated on the electronic filing receipt.

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**OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

Case No.: 09-CA-158662

AIRGAS USA, LLC

Respondent

And

**STEVEN WAYNE ROTTINGHOUSE, JR.,
an Individual**

Charging Party

Place: Cincinnati, OH

Date: 02/16/16

Pages: 1-218

Volume: 1

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1 UNITED STATES OF AMERICA
2 BEFORE THE NATIONAL LABOR RELATIONS BOARD
3 REGION 9

4 ~~~~~
5 AIRGAS USA, LLC

6 Respondent

7
8 and

Case No.:
09-CA-158662

9
10 STEVEN WAYNE ROTTINGHOUSE, JR.,
11 an Individual

12 Charging Party
13
14
15

16 The above-entitled matter came on for
17 hearing pursuant to notice, before
18 Administrative Law Judge Donna Dawson, at the
19 National Labor Relations Board, 3003 John Weld
20
21 Peck Federal Building, 550 Main Street,
22
23 Cincinnati, Ohio, on Tuesday, February 16th,
24
25 2016, at 9:00 a.m.

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ALSO PRESENT:

STEVEN WAYNE ROTTINGHOUSE, JR.

CLYDE A. FROSLEAR

DAVID LUEHRMANN

DANIEL GOODE

MARK MacBRIDE

ROBERT OESTREICHER

BARRY PERKINS

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1 PROCEEDINGS

2 (9:12 a.m.)

3 JUDGE DAWSON: We are on the
4 record. And I meant to say off the record that
5 if it gets too warm in here feel free to take
6 your jackets off or whatever. Because it can
7 get warm in here.

8 And as I've said again, good
9 morning everyone. I'm Administrative Law Judge
10 Donna Dawson. And I'm with the National Labor
11 Relations Board. I am with the Division of
12 Judges, there in Washington D.C. I'm assigned
13 to that office, and I was assigned to this case
14 to hear the case. And the hearing will now be
15 in order.

16 And this is a formal trial before
17 the National Labor Relations Board in the case
18 of Airgas USA LLC and Steven Wayne Rottinghouse
19 Jr. An individual. Case number 09-CA-158662.
20 And today is February the 16th, 2016.

21 And at this time I will ask that
22 counsel and other representatives of the
23 parties please state your appearances for the
24 record.

25 MR. BRINKER: Erik Brinker, E-R-I-K

1 B-R-I-N-K-E-R. Counsel for the General
2 Counsel.

3 JUDGE DAWSON: Okay. And who do
4 you have with you at your table?

5 MR. BRINKER: Mr. Steve
6 Rottinghouse Jr.

7 JUDGE DAWSON: Okay. And sir, for
8 the Respondent?

9 MR. MURPHY: Hi. Michael C.
10 Murphy, M-U-R-P-H-Y. Counsel for Airgas USA
11 LLC.

12 JUDGE DAWSON: And do you have a
13 representative at your table?

14 MR. MURPHY: Yes.

15 THE WITNESS: Clyde Froslear,
16 F-R-O-S-L-E-A-R.

17 JUDGE DAWSON: Thank you. And at
18 this point, again, I'm going to say that if
19 settlement discussions are desired at any time
20 during the trial I'll be glad to grant a
21 reasonable recess for that purpose. I know
22 during the various conference calls that we
23 had, we had discussed trying to resolve the
24 case.

25 And as I stated then, I believe

1 it's beneficial when cases are resolved, and
2 you have some input into the outcome of the
3 case, rather than if it is not resolved through
4 settlement, it's resolved through my issuing a
5 decision in the case. Which can result in an
6 outcome favorable to one side and unfavorable
7 to another side.

8 And all parties going into these
9 things believe they have the best strongest
10 case. But that isn't always the case, of
11 course. Well, it's never the case, because one
12 side wins, one side loses.

13 And, also, I thought that this case
14 should be resolved because of the nature of the
15 case. You know, the nature of what is at
16 issue. There's no money involved. And I
17 believe that it's something that should be
18 resolved. I still believe that.

19 But the parties wish to go forward.
20 We're not able to come to resolution in the
21 case. So we're where we are now at this point
22 in the game. And just so a reminder to parties
23 the benefits of resolving in additional course
24 to having some input is to save on resources;
25 time resources, money resources. Because

1 oftentimes a case doesn't end here. If it's
2 appealed or exceptions are filed with the
3 National Labor Relations Board it could take
4 much time.

5 So on either side, you're waiting
6 and held in limbo. If you're the side who is
7 ordered to pay any money -- well, there's no
8 money in this case. So that's not really an
9 issue in the case. But of course, if you
10 appealed and go forward, both sides are going
11 to incur great amounts of expense and
12 resources. So consider that.

13 And again, at any time if you
14 seriously want to discuss settlement, please do
15 that. That happens often, even at the end of
16 testimony. Often, one side or the other or
17 both want to get together to discuss that.

18 So anyway, again, opportunities for
19 those discussions will be available at any
20 time. Just let me know.

21 And at this time I'm going to ask
22 if Mr. Brinker would produce the formal papers
23 in the case. And if there is going to be a
24 motion to sequester, let me know.

25 MR. BRINKER: Yes, your Honor. I

1 offer into evidence the Formal Papers in this
2 case. They have been marked for identification
3 as General Counsel's Exhibit 1(a) through 1(f),
4 inclusive. Exhibit 1(f) is an index and
5 description of the entire exhibit. The exhibit
6 has been shown to all parties. And a copy of
7 the index and description has been given to the
8 parties. Your Honor, may I approach the bench,
9 please?

10 JUDGE DAWSON: Yes.

11 - - - - -

12 (Thereupon, General Counsel Exhibit
13 1(a) through 1(f), Formal Papers,
14 were marked for purposes of
15 identification.)

16 - - - - -

17 JUDGE DAWSON: And if there are no
18 objections I'll admit the Formal Papers into
19 the record.

20 MR. MURPHY: No objections.

21 JUDGE DAWSON: Thank you. I'm
22 going to admit into the record then the Formal
23 Papers introduced by Mr. Brinker. And General
24 Counsel Exhibit 1(a) through 1(f) inclusive are
25 so admitted. And at this time?

1 MR. BRINKER: Yes, your Honor. I
2 would also like to read stipulations that both
3 parties have agreed to into the record?

4 JUDGE DAWSON: Yes.

5 MR. BRINKER: Your Honor,
6 Respondent admits filing of service of charges,
7 and admits commerce jurisdiction of the NLRB.
8 Respondent also admits that Clyde Froslear,
9 operations manager, is a supervisor per Section
10 211 of the National Labor Relations Act. And
11 as an agent of Respondent for Section 213 of
12 the National Labor Relations Act.

13 Respondent further admits Dave
14 Luehrmann, who is the facility manager and is a
15 supervisor per Section 211 of the NLRA and is
16 an agent of the Respondent per Section 213 of
17 the NLRA.

18 Respondent gave a written warning
19 to Steve Rottinghouse, the Charging Party, and
20 Petitioner in this case on August 16th, 2015.
21 And Rottinghouse filed charges with the
22 National Labor Relations Board in cases
23 09-CA-52301 and 09-CA-155497.

24 Your Honor, I would also offer into
25 evidence Joint Exhibits 1 through 10 inclusive,

1 which I have copies here.

2 - - - - -

3 (Thereupon, Joint Exhibits 1 through
4 10, were marked for purposes of
5 identification.)

6 - - - - -

7 JUDGE DAWSON: Okay. And since
8 they're joint exhibits -- are there any
9 objections to the stipulations, et cetera?

10 MR. MURPHY: No.

11 JUDGE DAWSON: I accept the
12 stipulations as read by Mr. Brinker into the
13 record. And I am accepting -- and they are
14 admitted, they're on the record. And now with
15 regards to Joint Exhibits 1 through 10 I will
16 admit them into the record as well.

17 Off the record for a moment.

18 (Off the record.)

19 JUDGE DAWSON: Okay. Back on the
20 record. And Mr. Brinker?

21 MR. BRINKER: Yes, your Honor. I'd
22 like to move for sequestration of witnesses at
23 this time.

24 JUDGE DAWSON: Okay. And if there
25 are no objections I'm going to do that. I'm

1 just going to grant that. And I'm issuing
2 therefore a sequestration order in this
3 proceeding. And this means that all persons
4 who expect to be called as witnesses in this
5 proceeding, other than a person designated as
6 essential to the presentation of a party's case
7 -- and in this particular case, that exception
8 would apply to Mr. Froslear and Mr.
9 Rottinghouse.

10 And those other individuals will be
11 required to remain outside the hearing room
12 whenever testimony or other proceedings are
13 taking place. A limited exception applies to
14 witnesses who might be alleged discriminatees.
15 I don't think we have that in this case.

16 The sequestration order also
17 prohibits all witnesses from discussing with
18 any other witness or any possible witness the
19 testimony that he or she has already given or
20 will give.

21 Likewise, counsel for a party may
22 not disclose to any witness the testimony of
23 any other witness. Counsel may, however,
24 inform his or her own witness of the content of
25 testimony given by an opposing party's witness

1 to prepare to rebut that witness' testimony.
2 It is the responsibility of counsel to see, at
3 all times, that they and their witnesses comply
4 with the sequestration order.

5 And at this time any of those
6 individuals need to leave the hearing room and
7 take into whatever room has been designated.
8 And we're going to go off the record for a few
9 minutes while that happens.

10 (Off the record.)

11 JUDGE DAWSON: We're going to go
12 back on the record. And at this time we're
13 going to have the case, the General Counsel's
14 case. And Mr. Brinker, if you'd like to make a
15 brief opening statement, you may do so.

16 And Mr. Murphy, you may either make
17 your opening, if you'd like, after Mr. Brinker
18 or you can wait until the beginning of the
19 presentation of your case.

20 MR. MURPHY: I'll go after Mr.
21 Brinker. Thank you.

22 JUDGE DAWSON: You may proceed,
23 sir.

24 MR. BRINKER: Good morning, your
25 Honor. May it please the Court, my name is

1 Erik Brinker, Counsel for the General Counsel.
2 This case involves a violation of Section 884
3 of the National Labor Relations Act.

4 Respondent, Airgas USA, violated
5 the Act by more strictly enforcing work rules
6 against, and more severely disciplining Steven
7 Rottinghouse because of and in retaliation for
8 his protected NLRB activities.

9 Your Honor, we will hear testimony
10 today from Mr. Clyde Froslear, the operations
11 manager, who stated under oath in his affidavit
12 to the board in a previous case that he
13 announced to his employees in two separate
14 meetings that management would give a verbal
15 warning to employees at the first violation of
16 a rule and a written warning at the second
17 violation of the same rule.

18 Mr. David Luehrmann, the facility
19 manager, will also testify to the same thing.
20 We will hear from Mr. Rottinghouse himself, who
21 will testify that on August 3rd, 2015, he was
22 being trained on a vehicle by Robert
23 Oestreicher, a fell employee.

24 After his training on the vehicle,
25 he returned to the Respondent's facility to

1 drop Mr. Oestreicher off. On his way into the
2 parking lot, Mr. Rottinghouse had to forcefully
3 apply his brakes in order to avoid a collision
4 with the parking lot's gate, which was blown
5 closed by the wind as he approached.

6 Mr. Rottinghouse will testify that
7 a group of cylinders that were properly secured
8 to the pallet in the back of his truck tilted
9 forward slightly on his truck because of the
10 abrupt stop at the gate.

11 Clyde Froslear will claim that he
12 heard a rattling in the back of Rottinghouse's
13 truck. Upon investigating the rattling, he
14 noticed the leaning cylinders and decided to
15 take pictures of them.

16 Although he had at least two
17 opportunities to talk with Rottinghouse that
18 day about the noise and leaning cylinders, he
19 did not say a word to him. Although he saw
20 Rottinghouse two days later during a grievance
21 meeting to discuss different discipline with
22 Rottinghouse, he did not say anything to him
23 then.

24 It was not until three days later
25 that Froslear actually told Rottinghouse that

1 he had heard rattling in the back of his truck,
2 and that he attributed the rattling to
3 cylinders he claims were not properly secured.

4 You will hear testimony today that
5 Mr. Rottinghouse offered a completely
6 reasonable explanation for the noise coming
7 from the back of his truck. An explanation
8 that could have been validated with a few
9 seconds of investigation. But Mr. Froslear
10 refused to investigate.

11 You will hear testimony explaining
12 why the discipline Rottinghouse received was
13 not warranted because of the nature of the
14 cylinders he was hauling. When confronted with
15 this reality, Froslear instead chose to trump up
16 the violation because of Rottinghouse's history
17 of filing charges with the Labor Board.

18 As you know, your Honor, direct
19 evidence of motive in these types of cases,
20 like an admission, is -- in the connection
21 between Rottinghouse's board activity, can be
22 shown through circumstantial evidence. This
23 includes the timing of the discipline, which
24 was within a few days of the resolution of a
25 charge with the Labor Board and a day after

1 Respondent held a grievance meeting over the
2 same issue.

3 There is also evidence of pretext.

4 There is evidence showing there is a
5 perfunctory investigation. And finally,
6 evidence that will be presented that
7 Rottinghouse received more severe discipline
8 than other employees who were not engaged in
9 Board activities. And that the discipline he
10 received was not commensurate with the alleged
11 violation.

12 JUDGE DAWSON: Okay. Mr. Murphy?

13 MR. MURPHY: Yes. Good morning,
14 your Honor. May it please the Court, My name
15 is Mike Murphy, counsel for Airgas USA LLC. No
16 one denies that Mr. Steve Rottinghouse filed a
17 series of Labor Board charges. And though
18 these charges may have been distracting to
19 Airgas management, the evidence will show that
20 this Board activity had absolutely no effect on
21 the disciplines issued to this employee.

22 What does Airgas do? Airgas hauls
23 heavy, large, metal cylinders along our
24 country's common ways. Often containing
25 explosive and flammable gases. While we do

1 this we need to keep America's families safe
2 and our employees safe. Because of this we are
3 obsessed with safety. And we do not tolerate
4 any violations of our safety rules.

5 When a safety rule is broken, the
6 employee gets disciplined. It's that simple.
7 The evidence in this case will show that the
8 party's collective bargaining agreement
9 contains language that anticipates written
10 warnings, suspensions and terminations. But
11 not verbal warnings.

12 Even so, the evidence will also
13 show that there is a clear past practice of
14 management adding a first disciplinary step, a
15 verbal warning for minor offenses.

16 Minor offenses are violations like
17 failure to wear safety glasses, or gloves, or
18 clocking in one minute early. More serious
19 violations like accidents, improperly strapping
20 cylinders, unsecured loads and backing without
21 practicing GOAL -- which stands for Get Out And
22 Look -- always result in an immediate written
23 warning.

24 In this case the written warning
25 was properly issued. Improperly strapped

1 cylinders is serious. According to Airgas
2 rules, cylinders should not move or rattle. On
3 the day in question, the cylinders on
4 Rottinghouse's truck did both.

5 The written warning was proper
6 because this was a serious violation that
7 warrants a written warning. Furthermore, even
8 if characterized as minor, and frankly how
9 could anyone compare this to not wearing safety
10 glasses, the written warning would be proper
11 because there was already a discipline for
12 another DOT violation in Mr. Rottinghouse's
13 file from one month prior. A discipline that
14 was investigated by the Labor Board in a charge
15 that the Labor Board dismissed. This was
16 progressive by any definition of progressive.

17 For this reason, Airgas
18 respectfully urges denial of this complaint.

19 JUDGE DAWSON: Okay. Thank you
20 both. And Mr. Brinker, your first witness,
21 please.

22 MR. BRINKER: Yes, your Honor.
23 We'd like to call Clyde Froslear as an adverse
24 witness under --

25 JUDGE DAWSON: Excuse me. Let's go

1 off the record. There's someone lingering
2 outside the door there.

3 (Off the record.)

4 JUDGE DAWSON: Let's go back on the
5 record. You may proceed.

6 MR. BRINKER: Yes, your Honor. I'd
7 like to call Clyde Froslear as an adverse
8 witness pursuant to 611(b).

9 JUDGE DAWSON: Okay, Mr. Froslear,
10 you may have a seat here, sir. Okay, Mr.
11 Froslear, raise your right hand please.
12 (Whereupon, .

13 CLYDE FROSLEAR
14 Was called as a witness by and on behalf of the
15 Charging Party and, after having been duly
16 sworn, was examined and testified as follows:)

17 JUDGE DAWSON: Thank you, sir. You
18 may lower your hand. And you may proceed.

19 MR. BRINKER: Okay.

20 Q. Good morning, Mr. Froslear. Could
21 you please explain what your position is with
22 the Respondent, Airgas?

23 A. Operations manager.

24 Q. Okay --

25 A. Operations manager, at three

1 facilities -- report to me.

2 JUDGE DAWSON: You're going to have
3 to speak up. I know you -- it sounds like you
4 have a cold or something. But try to keep your
5 voice up. Thank you.

6 THE WITNESS: Okay.

7 Q. And generally speaking, what do
8 your responsibilities include as the facility
9 manager?

10 A. Everything from production to
11 distribution to labor issues, discipline,
12 safety practices and following all SOPs.

13 Q. You mentioned discipline there. Do
14 you regularly issue discipline or do you
15 typically have managers who handle the
16 day-to-day disciplining of the employees?

17 A. No. The managers, if they have an
18 issue, they will contact me, and we'll discuss
19 the matter. And I'll decide what course of
20 action to take from there.

21 Q. Is it you or your managers that
22 typically sign off on discipline, as far as
23 issuing the discipline to the employee?

24 A. It would typically be the manager's
25 name on the counselling or the discipline. And

1 I usually try to attend all of those issuings
2 of those disciplines.

3 Q. But you don't issue all the
4 discipline -- I'm sorry, you don't attend all
5 discipline meetings?

6 A. Not 100 percent.

7 Q. Okay. Now, as you know, your
8 counsel, Mr. Murphy, and I have stipulated to
9 several things in order speed up this
10 proceeding. One of those things that we
11 stipulated to is that Mr. Rottinghouse filed a
12 charge because of two safety meetings at Airgas
13 that you spoke at on April 28th, 2015. Do you
14 remember speaking at those meetings?

15 A. I do.

16 Q. During the NLRB's investigation
17 into the conduct of those meetings, you
18 provided a sworn affidavit to the Board agent,
19 correct?

20 A. I did.

21 Q. And you testified in that affidavit
22 that the reason you spoke with the employees
23 that day was to make sure that they understood
24 the disciplinary process, right?

25 A. I did.

1 Q. How did the progressive discipline
2 policy with the employer work? Could you
3 explain that to me?

4 A. For minor offenses, in the past we
5 would verbally approach the employee and tell
6 him what was going wrong. Per the contract, it
7 starts at written and then it's suspension.

8 Q. Okay. So you told them during that
9 meeting that it was for minor offenses that
10 they would receive a verbal warning?

11 A. Well, during the meeting, what I
12 told them was that, moving forward, we were
13 going to no longer -- a verbal pat on the back,
14 hey, you forgot your safety glasses, that we
15 were going to have to document it.

16 Q. Okay. I'm going to present you
17 what has been previously marked as General
18 Counsel's Exhibit 2. Your Honor, may I
19 approach the bench?

20 JUDGE DAWSON: Yes, you may.

21 - - - - -

22 (Thereupon, General Counsel's
23 Exhibit 2, Confidential Witness
24 Affidavit, was marked for purposes
25 of identification.)

1 - - - - -

2 Q. Now, looking at the -- what I
3 handed you as General Counsel's Exhibit 2 is --
4 could you describe what this is?

5 A. This is the Affidavit I gave.

6 Q. Okay. And that's your initials on
7 the bottom of each page?

8 A. Yes.

9 Q. And that is your signature at the
10 end?

11 A. Yes.

12 Q. Okay. Now, if you could look on
13 page 2, at line 6 -- I'm sorry at line 4, where
14 it says, "At the meeting"?

15 A. Yes.

16 Q. Could you read that sentence,
17 please?

18 A. "At the meeting I wanted to make
19 clear to the employees that once they violated
20 a rule for the second time they would receive a
21 written warning."

22 Q. Okay. And could you read the next
23 sentence?

24 A. "In the collective bargaining
25 agreement for this facility progresses the

1 disciplinary process says that an employee will
2 be given get a written warning after the first
3 violation of rule."

4 Q. And then that next sentence after
5 that?

6 A. "However, for example, if we see an
7 employee not wearing safety glasses we will
8 first tell that employee to make sure they are
9 wearing their safety glasses. However, if we
10 see the same infraction again we will give that
11 employee a written warning."

12 Q. Now, before, you stated that you
13 had told them that you would document
14 everything?

15 MR. MURPHY: Objection,
16 mischaracterization of prior testimony.

17 MR. BRINKER: I disagree.

18 JUDGE DAWSON: I'm going to
19 overrule the objection. I don't think it's a
20 mischaracterization of prior testimony. Go on.

21 Q. Just before you testified that you
22 were explaining at this meeting that you were
23 going to document all the discipline, correct?

24 A. Correct.

25 Q. Now, you say here, if we see an

1 employee not wearing safety glasses we will
2 first tell that employee to make sure they're
3 wearing their glasses?

4 A. That was past. That's what we were
5 doing.

6 Q. Okay. So you did not mean that,
7 going forward, you will tell an employee if you
8 see the same infraction again we will give that
9 employee a written warning?

10 A. No. I was relaying to the team
11 that, in the past, where it used to be a pat on
12 the shoulder, hey, put your safety glasses on,
13 moving forward we were going to document that
14 conversation as a progressive discipline. I
15 want to document everything moving forward.

16 Q. Okay. Then why did you say in that
17 sentence, on line 4, "At the meeting I wanted
18 to make clear to employees that once they
19 violated a rule for a second time they would
20 receive a written warning"?

21 A. Well, the first one's going to be a
22 verbal documented. The second one would be a
23 written document. All will be documented.

24 Q. Okay. So did you explain that
25 explicitly to the employees that day?

1 A. I hope so.

2 Q. Could you explain to me -- never
3 mind. I apologize. In your position as the
4 operations managers at Airgas, do you
5 personally inspect driver's loads on a regular
6 basis?

7 A. I do not.

8 Q. When a driver checks his or her
9 load, they are supposed to visually and
10 physically inspect the load, correct?

11 A. Correct.

12 Q. Why did you go and inspect the back
13 of Mr. Rottinghouse's truck on April 3rd -- I'm
14 sorry on August 3rd?

15 A. It was lunchtime. I stepped out to
16 my car to grab some snack item in my car, which
17 is next to the entrance coming into the
18 facility. While I was standing there Steve
19 Rottinghouse was pulling in. Stopped, opened
20 up the gate and proceeded into the yard. While
21 all this was going on is when I heard the
22 rattling and I witnessed cylinders falling.

23 Q. You witnessed the cylinders
24 falling?

25 A. Yes, when it came to a stop.

1 Q. So did they actually fall?

2 A. They tilted.

3 Q. How far did they tilt?

4 A. 10, 15 degrees.

5 Q. Okay. So were they in danger of
6 falling over or did they just tilt?

7 A. No, they are in danger. Any time
8 cylinders move they are not secure and there's
9 a possibility they could fall out into the
10 road.

11 Q. Did you physically check any of the
12 cylinders to see if they were unsecured or in
13 danger of falling?

14 A. Yes. I walked up to the trailer
15 and inspected it.

16 Q. Okay. Did you actually physically
17 touch any of the cylinders to see if they were
18 moving?

19 A. No. I didn't have to. I saw them
20 move.

21 Q. So you were looking at his truck,
22 looking at the back of his truck when he pulled
23 in?

24 A. I was.

25 Q. Do you know if the cylinders were

1 strapped vertically before Rottinghouse had to
2 make an abrupt stop at the Airgas facility?

3 A. Yes. They were standing when I saw
4 them, fall over.

5 Q. So they were vertical?

6 A. Yeah.

7 Q. And they fell over?

8 A. They tilted.

9 Q. To your knowledge, did Mr.
10 Rottinghouse park his truck in a safe location?

11 A. Yes. I did notice that he didn't
12 chock his wheels. But that's another subject.

13 Q. Okay. But he parked it in a safe
14 location?

15 A. Yes.

16 Q. To your knowledge, did Mr.
17 Rottinghouse straighten and retighten the
18 cylinders as soon as he noticed that they had
19 leaned forward at the abrupt stop?

20 A. I saw Steve come out and fix the
21 load. Why he decided to fix that particular
22 pallet, I have no idea.

23 Q. And where were you looking? Where
24 were you --

25 A. I was in the office looking outside

1 a window. I was talking with Carl Hanna.

2 Q. Other than the distance from the
3 gate that the wind was blowing closed against
4 Mr. Rottinghouse's truck to where he safely
5 parked, was there any other time when the
6 cylinders were not vertical, that you know of?

7 MR. MURPHY: Objection. There were
8 a lot of facts contained in that question. And
9 I'm worried that an affirmative answer is going
10 to affirm all the facts he just recited. And
11 I'm not sure the witness knows what the answer
12 --

13 JUDGE DAWSON: What was the
14 question, again, Mr. Brinker?

15 Q. Other than the distance from the
16 gate that the wind was blowing closed against
17 Mr. Rottinghouse's truck to where he safely
18 parked, was there any other time when the
19 cylinders were not vertical that you know of?

20 JUDGE DAWSON: Okay. I'm --

21 MR. BRINKER: I can ask it in a
22 different way, your Honor.

23 JUDGE DAWSON: Yes.

24 Q. From the distance of the gate to
25 where he parked.

1 A. Yes.

2 Q. Was there any other time that you
3 know of where the cylinders were not vertical?

4 A. When he entered the yard until he
5 came to a stop, they were standing straight up.
6 When he came to a stop, they tilted.

7 Q. Okay.

8 JUDGE DAWSON: And I'm sorry. How
9 many degrees did you say they tilted?

10 THE WITNESS: 10, 15.

11 JUDGE DAWSON: Okay. Go on, Mr.
12 Brinker.

13 Q. Is this the first time you've heard
14 of cylinders with two straps securing them
15 tilting a few degrees?

16 MR. MURPHY: Objection. The
17 question contains an assertion that two straps
18 were securing the cylinders. I think you have
19 to lay the foundation first and ask him, were
20 two cylinders properly strapped.

21 JUDGE DAWSON: I'm going to sustain
22 the objection in part, and ask that you
23 rephrase the question.

24 MR. BRINKER: Yes, your Honor.

25 JUDGE DAWSON: Perhaps if you want

1 to ask if there was ever a time when that
2 occurred?

3 MR. BRINKER: Yes, your Honor.
4 I'll do it this way.

5 Q. If you could look at what's been
6 marked as Joint Exhibit 2, I'll also put a copy
7 up on the smart board here if there's no
8 objections to that.

9 MR. MURPHY: No objection.

10 Q. Does this accurately reflect the
11 photograph that you took on that day?

12 A. Yes.

13 Q. Okay. And you recognize this
14 photo?

15 A. I do.

16 Q. To your knowledge, it hasn't been
17 altered in any way?

18 A. No.

19 Q. Does this accurately represent the
20 condition of the cylinders when you saw them
21 that day?

22 A. Yes.

23 Q. Okay. And so the cylinders were
24 not leaning any more than this, on that day,
25 correct?

1 A. No.

2 Q. And when he pulled into the
3 facility, I believe you testified before that
4 they were vertical and they moved into this
5 position once he stopped?

6 A. Yes.

7 Q. Did they move into the position
8 once he stopped at the gate or once he stopped
9 and parked his truck?

10 A. I saw them tilt when he came to a
11 stop in the yard.

12 Q. In the yard. Not at the gate?

13 A. No.

14 Q. Looking at this, you can see that
15 there are two straps securing those cylinders,
16 correct?

17 A. A poorly secured job.

18 Q. But, yes, there's two cylinders --

19 A. There's two straps.

20 Q. Is this the first time you have
21 heard of cylinders with two straps securing
22 them tilting?

23 A. No.

24 Q. Okay. Could you explain to me how
25 these cylinders are mis-strapped?

1 A. Yes. First of all, we teach people
2 to nest cylinders. Which means, it kind of
3 ends up being a pyramid. So when you strap
4 them, the force of each other is holding them
5 up.

6 The way these are, in being not
7 securely strapped, they're just going to
8 continue to shake back and forth. There's
9 nothing to stop them. And if they keep shaking
10 they're just going to get looser and looser.
11 And the possibility of falling down, falling
12 off the trailer and rolling off the truck.

13 Q. Okay. And so what are drivers
14 taught if they get to the back of their truck
15 and they see that the straps are coming loose
16 or the cylinders are starting to tilt?

17 A. Well, first of all, employees are
18 taught not to load this way from the get go.
19 They should have been put on. They should have
20 been nested. They should have been tightly
21 strapped before leaving. And then as you go
22 down the highway, if you check your load and
23 it's loose, you tighten it back up. You never
24 want to start going down the highway in this
25 situation.

1 Q. Did you allege that Mr.
2 Rottinghouse had left the facility with the
3 cylinders looking this way?

4 A. I know for a fact he came into the
5 yard with these cylinders. Which means that
6 his previous stop to coming back, he loaded it
7 like that.

8 Q. Is it your opinion that there is no
9 way that this happened when he made a sudden
10 stop at the gate?

11 A. No. There's no way if that
12 cylinder to the far right was nested between
13 the two on the left -- just jumped over there.
14 It couldn't happen.

15 Q. And how much experience do you have
16 loading cylinders?

17 A. 25 years.

18 Q. And you were a driver, as well?

19 A. I've never been a driver.

20 Q. You've never been a driver. Did
21 you load cylinders?

22 A. I have loaded trailers. And we
23 always nest.

24 Q. Do you know if these cylinders were
25 in danger of becoming loose? And by loose I

1 mean coming out of the straps?

2 A. Yes. If they tilted over in the
3 first place, they are loose.

4 Q. Were they in danger of braking free
5 of the straps?

6 A. Continually going down the highway,
7 yes, it's possible.

8 Q. But at this point in time they were
9 not in danger of coming out of the straps?

10 A. Yes. They were. That small
11 cylinder could have easily fell out. Notice at
12 the top, that strap is just at the cap level.
13 That cylinder, that's nothing stopping it at
14 the bottom from slipping down and coming out.

15 Q. Did you inspect the vehicle Mr.
16 Rottinghouse was driving before he left the lot
17 first thing in the morning?

18 A. No.

19 Q. If you saw a serious safety issue
20 with a vehicle you would ensure it was
21 corrected before the driver left the parking
22 lot again, correct?

23 A. I would have.

24 Q. So besides taking -- and I'm sorry,
25 so you came in. You saw this while you were

1 eating at your car. What did you do next?

2 A. I went into the office. Got my
3 phone, my safety glasses. Went out into the
4 yard and took a picture of these cylinders.

5 Q. Okay. Besides taking your picture
6 of the cylinders, did you ever physically
7 inspect the cylinders to see if they were
8 loose?

9 A. I don't think I had to. I could
10 see them.

11 Q. Did you talk to Mr. Rottinghouse
12 after you noticed the leaning cylinders?

13 A. I didn't know where Mr.
14 Rottinghouse was at.

15 Q. Did you see Mr. Rottinghouse?

16 A. I saw Mr. Rottinghouse come out and
17 get up on the trailer and fix these cylinders.
18 And I was inside the building looking outside a
19 window.

20 JUDGE DAWSON: I'm sorry, was this
21 before or after you took the picture?

22 THE WITNESS: After.

23 JUDGE DAWSON: Okay.

24 Q. So you did not see Mr. Rottinghouse
25 before you took the pictures or immediately

1 after?

2 A. The last time I am saw Mr.
3 Rottinghouse was pulling in. And I didn't,
4 quite frankly, see him getting out of his
5 tractor. I was concentrating on this. I went
6 and got my camera and safety glasses. When I
7 came out there was nobody there.

8 Q. You were wearing your safety
9 glasses when you came outside?

10 A. Yes.

11 Q. After you noticed the leaning
12 cylinders, did you talk to Mr. Oestreicher, who
13 had been in the truck with Rottinghouse?

14 A. No.

15 Q. And you're aware that Mr.
16 Oestreicher was training Mr. Rottinghouse that
17 morning?

18 A. I am not. I have no idea why he
19 was in that truck.

20 Q. I'm going to pull up what's been
21 marked as Joint Exhibit 3. Could you leaf
22 through -- you should have that there. It
23 should be the third series of documents there.
24 It should say on the bottom "Joint Ex 3"?

25 MR. MURPHY: It's the third page.

1 A. Okay. I only have 1, 2 and 4. I
2 don't have a 3.

3 Q. I apologize for that. You don't
4 have a 3? This one has a 3. I apologize for
5 that. If you could move to page 3, there?

6 MR. BRINKER: Your Honor, I
7 apologize. At this time I'd like to move for
8 admission of General Counsel's Exhibit 2.

9 JUDGE DAWSON: Are there any
10 objections? I can't remember what that was.

11 MR. BRINKER: That was his
12 affidavit.

13 MR. MURPHY: No objection.

14 JUDGE DAWSON: Okay. I'm admitting
15 into the record General Counsel's Exhibit 2,
16 Mr. Froslear's affidavit.

17 Q. Okay. Moving on now to Joint
18 Exhibit 3, could you identify this document?

19 A. Yes. This is the email I sent to
20 our driver trainer, Mark MacBride, probably
21 less than 10 minutes after taking the pictures.

22 Q. Okay. And --

23 JUDGE DAWSON: And I'm sorry. You
24 said Mark MacBride, you called him a trainer?

25 THE WITNESS: Yeah. Mark MacBride

1 is our driver trainer.

2 JUDGE DAWSON: Thank you.

3 Q. Your Honor, could we go off the
4 record for one second?

5 JUDGE DAWSON: We can go off the
6 record.

7 (Off the record.)

8 JUDGE DAWSON: Back on the record.

9 Q. So you started the conversation by
10 saying, "What do you think about this? Look
11 good to you," right?

12 A. Yes.

13 Q. There wasn't anything before this
14 in the email chain?

15 A. No, sir.

16 Q. Okay, now, he asked in this email
17 chain, "Did the driver catch it before
18 leaving?" And your response was, "I saw it
19 when he pulled in in the yard," correct?

20 A. I'm trying to follow along.

21 Q. Yeah, it goes from bottom to top.

22 A. Let me think about -- okay.

23 Q. And your response was "I saw it
24 when he pulled into yard"?

25 A. Right. At this point in time, Mark

1 MacBride doesn't realize that this load is not
2 going out for the first time, that it returned
3 off the road.

4 Q. And then he asked again, "Did it
5 get fixed before leaving?" Correct?

6 A. Yes.

7 Q. And your response, again, was,
8 "This is the way it was when he pulled in after
9 his run"?

10 A. Again, trying to make Mark
11 understand that this was a problem out on the
12 public highway. Not in our yard. It came in
13 this way.

14 Q. Do you know if Rottinghouse fixed
15 this problem as soon as it presented itself?

16 A. I have no idea what possessed Steve
17 Rottinghouse to climb up on the trailer and fix
18 that pallet.

19 Q. Do you know -- I'll ask it again,
20 if you can answer the question that I asked,
21 which is, do you know one way or other if
22 Rottinghouse fixed this problem as soon as it
23 presented itself?

24 A. I know Steve Rottinghouse fixed the
25 problem.

1 Q. Did you know if this is the first
2 time the problem presented itself?

3 A. I know it could not have been.
4 Because I saw it come in off the road this way.

5 Q. Did you explain to MacBride that
6 Rottinghouse had to hit his brakes hard when he
7 pulled into the lot?

8 A. I did not.

9 Q. Are drivers trained to check and
10 retighten cylinders throughout the day?

11 A. They are.

12 Q. Okay. And why is that?

13 A. So we don't end up with a situation
14 like this.

15 Q. But if a situation this occurs, the
16 driver is supposed to check and retighten it,
17 correct?

18 A. He's supposed to, and he should
19 have never left with this in the first place.
20 So we've got a couple problems here.

21 Q. Okay. So if they're not supposed
22 to leave in the first place, does it happen,
23 does it occur throughout the day that driver's
24 cylinders may become loose or straps may move?

25 A. It's possible.

1 Q. Okay. But it's possible enough
2 that it's part of the standard procedure of
3 transporting cylinders, correct?

4 MR. MURPHY: Objection. I don't
5 know what "it" is in that sentence.

6 Q. This situation, or we'll say straps
7 moving or cylinders coming loose to where they
8 tilt. It happens enough that it's standard
9 procedure the check and recheck the cylinders
10 throughout the day?

11 A. No. It doesn't -- that is not a
12 common occurrence. Our drivers, our loaders
13 are trained to secure it. And these straps,
14 once they're locked, should never move. Now,
15 they may. But they should never come lose, if
16 properly strapped.

17 Q. So they should never come lose.
18 But they do sometimes come loose. And that is
19 why there is a procedure in place that drivers
20 check and recheck their loads throughout the
21 day?

22 A. Yes.

23 Q. So what are drivers supposed to do
24 when straps work their way up or down on the
25 cylinders throughout the day?

1 A. If that should ever happen, they
2 should reposition it and tighten it down.

3 Q. If you look at the cylinders here,
4 other than the fact that they are leaning, can
5 you pinpoint how these cylinders were strapped
6 incorrectly?

7 A. They are not properly nested. The
8 strap at the bottom is not going around them.
9 It's going down into the corner. It's not done
10 the way they are taught.

11 Q. Could you define what "nesting"
12 means?

13 A. Nesting is, imagine building a
14 pyramid. Those two to the far right should
15 have been in between those two. The little one
16 should have been nested on one side of those.
17 And then strapped down. They should have all
18 been touching one another in a nest.

19 JUDGE DAWSON: When you say the one
20 on the far right, and you're talking about the
21 three tall cylinders in the back, the one on
22 our far right, as we look at this photograph,
23 you're saying that one should've been
24 positioned in between the first two, but in
25 front of it?

1 THE WITNESS: Yes.

2 JUDGE DAWSON: Like, the little one
3 is in the middle in the front of the first two,
4 going from left to right. You're saying that
5 the one on the far right should have been put
6 in front of the first two but nested against
7 it?

8 THE WITNESS: Yes, your Honor.

9 JUDGE DAWSON: Correct me if I'm
10 wrong. I'm just trying to understand.

11 THE WITNESS: Yeah. That's
12 partially right. The pallet has a back and two
13 sides.

14 JUDGE DAWSON: Oh. Okay.

15 THE WITNESS: Let's just say the
16 two, you could have picked either side. But
17 the two on the left should have went against
18 the back and the side. The third one should
19 have been nested in between them. And probably
20 the best one would have been to take that small
21 one and put it -- nest it between the one we
22 moved to the right, in between the nested
23 there, and against the rail. And strapped them
24 all down.

25 JUDGE DAWSON: So they all

1 should've been flush against the rail?

2 THE WITNESS: They should have all
3 been nested.

4 JUDGE DAWSON: Okay. I guess I'm
5 trying to understand what you mean by "nested."
6 Because right now they look like they're all
7 side by side. And that's why I was asking if
8 you mean by "nesting" that one should have been
9 in front of the two, pushed against them
10 tightly.

11 THE WITNESS: Your Honor, if those
12 two -- this one, we should have put right
13 there. We should've nested it.

14 JUDGE DAWSON: Right in front of
15 these two?

16 THE WITNESS: Right in front. So
17 these -- yeah, they would all be touching.

18 JUDGE DAWSON: They would all be
19 touching tightly. But one would be in front?

20 THE WITNESS: Yes.

21 JUDGE DAWSON: Okay. All right.
22 That's what I thought you meant. Go on.

23 MR. BRINKER: Your Honor, I don't
24 know if now is the appropriate time. But at
25 some point I'd like to take a brief break to

1 look at the training materials that were
2 provided this morning, as we talked about off
3 the record. I just received these training
4 materials this morning. I'd like to take a
5 look at them and cross examine the witness on
6 those. So I'd like to ask for a break now. If
7 not, then at the end of his testimony, before
8 his testimony concludes.

9 JUDGE DAWSON: Okay. You mean
10 before you finish with --

11 MR. BRINKER: Before I finish
12 direct examination of the witness.

13 JUDGE DAWSON: Okay. I just have
14 one more clarification question. And where
15 would you have put the small cylinder if the
16 one on the right had been nested?

17 THE WITNESS: I would have put it,
18 looking at the picture, to the left in between
19 that one we placed here. And then it would
20 have been nested in between that one and the
21 far back left one.

22 JUDGE DAWSON: Okay.

23 THE WITNESS: Right now it's just
24 hanging out there.

25 JUDGE DAWSON: All right. We'll go

1 off the record. And Mr. Brinker, I'll give you
2 a few minutes to do that.

3 (Off the record.)

4 JUDGE DAWSON: Back on the record.

5 - - - - -

6 (Thereupon, General Counsel Exhibit
7 6, Driver Demonstration report, was
8 marked for purposes of
9 identification.)

10 - - - - -

11 Q. Mr. Froslear, I'm going to hand you
12 what's been marked as General Counsel's Exhibit
13 6. Do you recognize these documents?

14 A. I do.

15 Q. What are they?

16 A. The first one is a Driver
17 Demonstration Report that our driver trainers
18 periodically drive along with all the drivers
19 that work for Airgas and make sure they are
20 doing everything properly, if they forget to do
21 anything something or reinforce something they
22 see that could be wrong.

23 Q. And on this, it's check marked
24 "yes" next to "Properly secure each group of
25 cylinders" under "Delivery Observation" on the

1 right hand side?

2 A. Yes.

3 Q. And this was given to him, when?

4 To Mr. Rottinghouse, when?

5 A. This looks like 11/9/2015.

6 MR. MURPHY: I just want to speak
7 to the record, that you're just reading off the
8 form, right? You don't actually know this was
9 given to him?

10 THE WITNESS: No, I don't.

11 MR. MURPHY: And I'd also like to
12 take this opportunity just to inform the
13 witness that you don't have to notice --

14 JUDGE DAWSON: Excuse me. You will
15 have an opportunity to cross examine the
16 witness.

17 MR. MURPHY: I'm sorry.

18 JUDGE DAWSON: You may proceed, Mr.
19 Brinker. You can't just stop and tell the
20 witness what you want said or what have you.
21 That's not permissible. Mr. Brinker?

22 MR. BRINKER: Yes, your Honor.

23 Q. Now, let's go back here to this
24 conversation. If you can pull up, keep that
25 next to you. If you go back to J3, which is

1 the conversation between you and Mr. MacBride?

2 A. Yes.

3 Q. Now, you asked Mr. MacBride, now
4 this is -- it says here at 8:33. So this
5 conversation started at 7:04. That was the
6 first message?

7 A. Yes.

8 JUDGE DAWSON: And this was the day
9 after the event?

10 THE WITNESS: Day after.

11 Q. Yes, this is the day after. So on
12 August 4th, 2015 -- so it happened on August --
13 this picture was taken on August 3rd, correct?

14 A. Correct.

15 Q. So this is 24 hours later. You
16 have this picture. Is this the picture that
17 you sent to him? Is that IMG0279JPG?

18 A. I believe it is, yes.

19 Q. Okay. So you sent that to him at 7
20 o'clock a.m. And then at 8:33 a.m., after you
21 had gone back and forth with him, you asked him
22 "Where would I find the strongest language
23 about load securement that drivers are trained
24 to?"

25 A. Yes.

1 Q. Why are you asking for the
2 strongest language?

3 A. I'm not -- since Mark MacBride is a
4 driver's trainer, he's a resource for me as to
5 what are exactly other drivers taught to. I
6 wanted to make sure that I didn't just guess at
7 what the material would have been to address
8 this problem.

9 Q. Okay. Now, did you look in the
10 driver training manual?

11 A. Once I was gathering information to
12 decide discipline, yes, I checked all the
13 resources to ensure that our drivers are taught
14 to do it correctly.

15 Q. So your purpose in asking this was
16 what?

17 A. To make sure I was looking at the
18 best possible material. I didn't want to be
19 looking at something -- for example, yeah,
20 we've trained you on first aid. That would do
21 me no good.

22 Q. But you're looking for the
23 strongest language. Why the strongest
24 language?

25 A. Key words: "Nesting, secure, no

1 rattling." Those types of things. To make
2 sure that when we teach somebody they fully
3 understand, it has to be secure. And secure
4 means a lot of things.

5 JUDGE DAWSON: Excuse me. Off the
6 record for just one moment.

7 (Off the record.)

8 JUDGE DAWSON: Back on the record.

9 Q. Okay. Now you said you did look
10 through the driver's training manual. The
11 drivers training manual, does it mention
12 anything about nesting?

13 A. I can't recall. I know there's
14 nesting in training material. Exactly where it
15 lies, I couldn't answer that right now.
16 There's so much.

17 Q. Did you mention anything to Mr.
18 Rottinghouse about nesting?

19 A. Did I personally?

20 Q. Yes.

21 A. At what point in time?

22 Q. On the day of.

23 A. No. I did not.

24 Q. Did you mention anything to him on
25 August 5th, when you were talking about a

1 different grievance?

2 A. A different grievance?

3 Q. About his other discipline on
4 August 5th?

5 A. If it wasn't pertaining to this,
6 probably not.

7 Q. Did you talk to him about it on
8 August 6th, during the discipline meeting
9 regarding this incident?

10 A. I don't recall everything I said.

11 Q. Did you talk to him about it during
12 the grievance hearing, the first grievance
13 hearing on this? Which would have taken place
14 on September 2nd?

15 A. I'm sorry, I don't recall.

16 Q. So you don't remember if you said
17 anything about nesting on the 2nd of September?

18 A. I believe we had three meetings.

19 Q. Did you saying anything to him on
20 the last grievance meeting on 9/23? Did you
21 say anything about nesting to him then?

22 A. I don't remember if we brought up
23 nesting.

24 Q. As far as you know, the proper way
25 to secure cylinders is that the cylinders are

1 vertical and they are all touching, meaning
2 there's no space in between the cylinders,
3 correct?

4 A. I don't know if that's the exact
5 language. The first paragraph in the drivers
6 training manual speaks to that.

7 Q. Let me find it. I believe I saw it
8 in here.

9 A. First paragraph, third sentence.
10 "This means the cylinders must be strapped,
11 chained or secured to the vehicle so that they
12 do not move or rattle."

13 Q. Is it possible that cylinders that,
14 there could be rattling coming from the truck
15 and it's not cylinders that the driver had any
16 ability to prevent from rattling?

17 A. Other than cylinders? The only
18 other thing on the cylinder might be that
19 cylinder cart you see. And it shouldn't be
20 rattling either.

21 Q. Okay. So there's no other way that
22 there could be cylinders or something else
23 that's not secured that the driver couldn't
24 affect? I'm sorry, I probably asked that
25 poorly. Let me ask again.

1 Is there anything else, any
2 cylinders, any other materials on the back of
3 the truck that could be rattling that wouldn't
4 be the driver's fault?

5 A. It may not be the driver's fault
6 but he can fix it. If he notices it he should
7 fix it.

8 Q. What is a 12-pack cradle?

9 A. A 12-pack cradle, instead of
10 individual cylinders like you see here, there's
11 12 of them. And when I say manifold together,
12 that underneath those caps there's valves. And
13 when a customer needs a product he taps into
14 the valve and product comes out.

15 When you order a 12-pack, the
16 customer needs a lot of products. So the
17 there's a manifold system that holds -- when
18 you open one up, you're opening all 12.

19 A 12-pack are cylinders that are
20 inside of a cage. They have four sides with
21 multiple bars, and bars to hold them in place.

22 Q. Are drivers trained to open up
23 those 12-pack cylinders?

24 A. We don't tear banks apart at
25 Cincinnati Dayton Road.

1 Q. And if there are cylinders inside
2 that are rattling, is it the driver's
3 responsibility to open that up and fix the
4 rattling?

5 A. Yes. A common practice to fix a
6 rattling cylinder is any piece of rubber, for
7 example, an old mud flap, something like that.
8 If it's rattling, you would then insert a piece
9 of rubber to keep it from rattling.

10 Q. And that's the driver's
11 responsibility to do that?

12 A. It's everybody's responsibility, if
13 there is a cylinder loose, to do that.

14 Q. And do you know whether or not Mr.
15 Rottinghouse is trained to do that?

16 A. I do not.

17 Q. Is there -- could you point to me
18 in the driver's training manual where it states
19 that you should take pieces of rubber and shove
20 them into the 12-pack cylinders?

21 A. I can't.

22 Q. Are there supplies provided by the
23 employer to put on the truck, that are put on
24 the truck, to secure these 12-pack cylinders if
25 one of the cylinders inside starts rattling?

1 A. The driver's do carry extra straps,
2 if they found something to be loose. Like for
3 a 12-pack, you could wrap a strap around the
4 top of the cylinders and secure them together
5 until you got back to the plant.

6 Q. Would that prevent them from
7 rattling?

8 A. Yes.

9 Q. Are they taught to do that?

10 A. They are taught to carry extra
11 straps so in case they need to secure something
12 they have it.

13 Q. But they're not taught specifically
14 to put straps and weave them into the cylinders
15 inside of the 12-pack cradle?

16 A. They are taught to secure
17 everything on a trailer with a strap if it's
18 loose or rattling, including, say like carts.

19 No one teaches a driver to strap a
20 cart down. If it's on the truck it can't move,
21 it can't rattle. Use a strap and strap it
22 down. There's no training to strap a cart like
23 there's training to strap a cylinder.

24 Q. Are these cradles, are they bolted
25 together already?

1 A. Yes. A loose cylinder that might
2 be rattling is not going to come out. It's not
3 going to fall out on the highway. It's not
4 going to kill somebody. It's inside a cage.
5 The best it's going to do is just sit there and
6 rattle.

7 Q. Would you give a written discipline
8 to an employee if they pulled into the lot and
9 one of those cylinders inside of the 12-pack
10 was rattling?

11 A. I would not.

12 Q. Okay. You met with Mr.
13 Rottinghouse for a grievance meeting on August
14 5th, correct?

15 A. Yes.

16 Q. Okay. And this was two days after
17 you saw the leaning cylinders, right?

18 A. Yes.

19 Q. Now, this grievance meeting was
20 about different discipline. But did you
21 mention anything about the leaning cylinders
22 then?

23 JUDGE DAWSON: I'm sorry? What was
24 your question?

25 MR. BRINKER: Yes, your Honor.

1 Q. Now, this grievance meeting on
2 August 5th was not about what happened on
3 August 3rd, correct?

4 A. I recall this meeting on August 5th
5 being a meeting to issue the written warning
6 about it.

7 Q. Okay. Would that might have been
8 on August 6th?

9 A. I can't recall. I believe you're
10 looking at it. I trust what you're telling me.

11 Q. So you have no reason to disagree
12 that on August 5th you held -- or a grievance
13 meeting was held regarding different discipline
14 for Rottinghouse, other than this? It was a
15 suspension for working off the clock?

16 A. I don't recall what date that was.

17 Q. But between August 3rd and August
18 6th, you did meet with Mr. Rottinghouse and
19 others regarding discipline. Do you remember
20 if that happened at all?

21 A. Are we talking about this incident?
22 I'm confused.

23 Q. I'm talking about on August 3rd,
24 you saw this incident happen?

25 A. Yes.

1 Q. On August 6th, you met regarding
2 the discipline for this?

3 A. Yes.

4 Q. In between that time, you met with
5 Rottinghouse and others regarding discipline
6 for a different event, correct?

7 A. I don't recall if it was in between
8 those days.

9 Q. Do you recall the meeting about the
10 discipline, whether or not -- not whether or
11 not it was in between those two days. But do
12 you recall that meeting at all?

13 MR. MURPHY: Objection. Please
14 just tell him which meeting you're talking
15 about.

16 MR. BRINKER: The meeting regarding
17 --

18 JUDGE DAWSON: Let's refer to this
19 specific incident as either the incident while
20 we're here or the discipline regarding the
21 cylinders.

22 Q. The grievance meeting regarding
23 Rottinghouse's suspension, do you remember a
24 grievance meeting over that suspension?

25 A. I'm sure we had it, yes.

1 Q. But to confirm, you don't remember
2 if that was on August 5th?

3 A. I do not remember what date it was.

4 Q. Do you remember during that meeting
5 talking about the leaning cylinders at all?

6 A. I do not remember.

7 Q. Now, if we could go to pull up
8 Joint Exhibit 1, which should be the top page
9 there. You indicated on his discipline sheet
10 that there was a pallet not properly strapped
11 which was causing the noise you a heard,
12 correct?

13 A. Correct.

14 Q. Do you remember if Mr. Rottinghouse
15 explained where the noise was coming from?

16 A. The day I issued this, I do.

17 Q. And what did he say?

18 A. He mentioned that the rattling was
19 coming from a hydrogen bank.

20 Q. And what is a hydrogen bank?

21 A. That's the one that -- all
22 cylinders resting inside of a cage.

23 Q. So that's commonly referred to as a
24 12-pack cradle?

25 A. Yes.

1 Q. Did you investigate Rottinghouse's
2 investigation of where the noise was coming
3 from?

4 A. I did not.

5 Q. Did Mr. Rottinghouse or Barry
6 Perkins, his steward, ask why this is a written
7 warning instead of a verbal warning?

8 A. I don't recall. They probably did.

9 Q. Do you recall what your response
10 would have been?

11 A. The severity of it. The contract
12 says it will be a written warning.

13 Q. On August the 6th, during this
14 meeting, Mr. Rottinghouse asked to see the
15 pictures, correct?

16 A. He did.

17 Q. And did you show him the pictures?

18 A. Not exactly at that time. We were
19 discussing something else. I showed him -- I
20 offered the pictures later on in that meeting.

21 Q. Did you offer them to Mr.
22 Rottinghouse or to Mr. Perkins?

23 A. Mr. Perkins. Steve never came back
24 to my office after that. I don't recall him
25 coming back to see the pictures.

1 JUDGE DAWSON: So you did not show
2 them to Mr. Rottinghouse when he asked to see
3 them?

4 THE WITNESS: I did not. Not at
5 that point, no.

6 Q. Mr. Rottinghouse said in this
7 meeting, "I saw you taking pictures," correct?

8 A. He did.

9 Q. And he asked, "Why didn't you come
10 and get me?" Right?

11 A. He did.

12 Q. And what was your response?

13 A. I don't recall. But I didn't know
14 where he was. I wasn't going to go walking
15 around looking for him.

16 Q. Did you ever see him face to face
17 on August 3rd?

18 A. No, I didn't. Because I didn't
19 know where he was. And since he came out and
20 fixed the load, there was nothing more that
21 needed to be done. If I would have saw him I
22 would have said fix it before you leave. And
23 he already did that.

24 Q. When you saw him fix the load, did
25 you take pictures of it after it was fixed?

1 A. I did not.

2 Q. Did you go out and observe whether
3 the cylinders were nested?

4 A. No. From -- I didn't go outside.
5 But from the window, I saw that he fixed it.

6 Q. How did he fix it? Did he nest it
7 in the way you're describing?

8 A. Yes.

9 Q. Or did he just move the cylinders
10 vertical --

11 A. He rearranged them and tightened
12 them down.

13 Q. He rearranged the order of the
14 cylinders and tightened them down. He didn't
15 just straighten them out and re-ratchet the
16 straps and make sure they're tight?

17 A. I don't believe so.

18 Q. And so from your viewpoint in your
19 office, you were satisfied with the condition
20 of the cylinders after he did that?

21 A. I was glad to see he recognized the
22 problem and fixed the problem.

23 Q. And you did not say anything else
24 to him that day after he had fixed the problem?

25 A. I did not.

1 Q. And you didn't tell him to fix the
2 problem. He did it on his own?

3 A. Yes.

4 Q. During any of these meetings, did
5 you tell Mr. Rottinghouse or Mr. Perkins that
6 this is a written warning because of the
7 progressive discipline policy?

8 A. I mentioned to him that it wasn't
9 his first offense. And the severity of it
10 warranted a written warning.

11 Q. Did you tell him that he was
12 receiving this because of a specific
13 progressive discipline policy?

14 MR. MURPHY: Objection. Asked and
15 answered.

16 JUDGE DAWSON: Yeah, I'm going to
17 overrule the objection. Answer the question
18 asked, please.

19 Q. Did you specifically mention
20 progressive discipline?

21 A. I mentioned that this wasn't his
22 first offense.

23 JUDGE DAWSON: Answer the question,
24 please.

25 THE WITNESS: I'm trying.

1 JUDGE DAWSON: Ask it again. It's
2 a yes or no.

3 Q. Did you specifically mention
4 progressive discipline?

5 A. Progressive? I don't remember.

6 Q. And as far as you're aware, if you
7 look at Joint Exhibit 9, these are your notes
8 taken on September 2nd, 2015?

9 A. Yes.

10 Q. As far as you're aware, reviewing
11 these notes, is there any mention of
12 progressive discipline during this meeting?

13 A. It does not.

14 Q. And I'm sorry, I went a little bit
15 out of order. If you go to Joint Exhibit 7,
16 does anything here mention progressive
17 discipline?

18 A. It does not.

19 Q. Okay. Did you mention on, if we're
20 staying here on Joint Exhibit 7, did you
21 mention anything here about this is his second
22 DOT violation, during this discipline meeting?

23 A. Which one are you on now?

24 Q. This is on Joint Exhibit 7.

25 A. I'm sorry. Your question was?

1 Q. Was there anything mentioned here
2 at this discipline meeting why this was a
3 written warning? I'm sorry. Was there
4 anything mentioned here that this was his
5 second DOT violation?

6 A. It does not.

7 Q. Okay. Now, if you go back to Joint
8 Exhibit 1, that's the first page, does it
9 mention anything here about why -- or about a
10 second DOT violation?

11 A. It does not.

12 Q. Does it mention anything here about
13 progressive discipline?

14 A. It does not.

15 Q. Okay, now I'm going to pull up what
16 is going to be marked as General Counsel
17 Exhibit 4.

18 MR. BRINKER: Your Honor, may I
19 approach the witness?

20 JUDGE DAWSON: Yes.

21 - - - - -

22 (Thereupon, General Counsel Exhibit
23 4, Counseling Statement, was marked
24 for purposes of identification.)

25 - - - - -

1 JUDGE DAWSON: Did you give it to
2 me?

3 MR. MURPHY: Are these all of them?

4 MR. BRINKER: This is all that you
5 sent me yesterday, last night.

6 MR. MURPHY: And they are in
7 chronological order?

8 MR. BRINKER: They are in the order
9 you gave me.

10 JUDGE DAWSON: And these are other
11 employees?

12 MR. BRINKER: Correct. These are
13 other employee's discipline.

14 Q. Could you identify these documents
15 for me, what this is?

16 A. Yes. They are counselling
17 statements, disciplinary, given to employees.

18 Q. If you could look at what's page 11
19 on this document, could you identify what this
20 is?

21 A. Are you -- the Rodger Haynes
22 1/28/2014?

23 Q. Correct.

24 A. Yes.

25 Q. Is this a written warning given to

1 Rodger Haynes?

2 A. It is.

3 Q. Do you know if this written warning
4 stayed or if it was grieved and reduced? Do
5 you know one way or the other?

6 A. I don't believe it was grieved.

7 Q. And you can see here, he had
8 received, on January 24th, 2014, a first
9 warning, correct?

10 JUDGE DAWSON: I'm sorry. What
11 pages are you on?

12 MR. BRINKER: Page 11, your Honor.

13 JUDGE DAWSON: Okay. Go on.

14 Q. Look at number 2 under "The above
15 named associated is being counseled for the
16 following reasons." At number two it says, "On
17 January 24th, 2014 another Dewar was found that
18 you had filled on 1/16/14 involving -- PRD
19 installed."

20 And if you look at number one, it
21 says in "November, 2013 we found you filled a
22 4L200 Dewar with 350 PRD installed." So is it
23 safe to assume that this employee had made the
24 same mistake earlier, and it cost the operation
25 \$2,500?

1 A. Yes.

2 Q. And did that, looking through here,
3 all of the documents, all of the counselling
4 statements have been subpoenaed. I didn't see
5 another written counselling for that. And that
6 cost the company \$2,500, right?

7 MR. MURPHY: Objection.

8 MR. BRINKER: I'm sorry. I'll
9 rephrase the question.

10 Q. So in November, 2013 did this
11 employee receive a written warning?

12 A. I don't recall.

13 Q. Okay. But on the second incident,
14 they did receive a written warning, correct?
15 This is the second incident here?

16 A. Yes.

17 Q. Let's just go to the next page,
18 here. So Barry Perkins, on October 13th, 2014
19 received a verbal counselling, correct?

20 A. I'm sorry?

21 Q. This is page 13.

22 A. Okay.

23 Q. And he received a verbal warning
24 for not wearing his seatbelt, right?

25 A. Yes.

1 Q. If we go to the next page, verbal
2 counselling for Bill Huff. He received a
3 verbal counselling because he clocked in at
4 8:02 p.m. -- he clocked out at 8:02 p.m. and
5 then clocked back in at 6:59 a.m., violating
6 DOT policy, right?

7 A. A couple minutes, minor offense.

8 Q. But that's what happened, correct?

9 A. Yes.

10 Q. And he received a verbal
11 counselling?

12 A. Yes.

13 Q. On March 18th, 2015, this is page
14 15 here, Robert Oestreicher received a verbal
15 warning for talking on his cell phone while
16 operating a tow motor, correct?

17 A. Right. Minor offense. Forklift
18 wasn't moving.

19 Q. Does it say here that this is a
20 minor offense?

21 A. No. A minor offense would have
22 warranted a verbal document.

23 Q. This was a violation of work rule,
24 correct?

25 A. Yes.

1 Q. Okay. If we go here, let's go to
2 the first page of this. In 2011, Bill Huff
3 received a written counselling, right?

4 A. He did.

5 Q. And what was this for?

6 JUDGE DAWSON: What page? I'm
7 sorry.

8 MR. BRINKER: Page 1, your Honor.

9 JUDGE DAWSON: Okay.

10 A. Unsecure load.

11 Q. And what do you mean by "unsecure
12 load" in this instance?

13 A. Not tightly strapped, improperly
14 nested, cylinders moving, wobbling, rattling.

15 Q. It was more than that, wasn't it?

16 A. I believe one of these cylinders
17 actually came loose and was rolling around on
18 the floor.

19 Q. Correct. Now, let me read this to
20 you here real quick. "Upon return from
21 Richmond, Indiana it was discovered that there
22 was a loose cylinder on its side on the floor
23 of the trailer." So completely unsecured,
24 right?

25 A. Yes.

1 Q. And there then there's also one
2 pallet with unsecured cylinders, correct?

3 A. I'm reading. Okay.

4 Q. Yes, so there was one pallet with
5 unsecured cylinders?

6 A. Yes.

7 Q. And also another pallet containing
8 liquid containers that was only secured by one
9 strap?

10 A. Correct.

11 Q. And are you saying that a loose
12 cylinder -- completely loose, not secure -- a
13 pallet with unsecured cylinders and a pallet
14 containing liquid containers only secured with
15 one strap is equal to what Mr. Rottinghouse --
16 to this?

17 A. I do. Unsecured is unsecured.

18 MR. BRINKER: I don't believe I
19 have any other questions at this time, your
20 Honor. Can I take just two minutes off the
21 record?

22 JUDGE DAWSON: Yes. We can go off
23 the record.

24 (Off the record.)

25 JUDGE DAWSON: Back on the record.

1 Q. If we go back to page 14 of General
2 Counsel's Exhibit 4. Now you said that this
3 was a minor violation, correct?

4 A. Was.

5 Q. Now, the Employer -- or I'm sorry
6 the Respondent had to actually go and pick up
7 this employee at another location because this
8 was a DOT violation and he was not allowed to
9 drive?

10 A. Correct.

11 Q. And that was a minor violation?

12 A. Correct.

13 MR. BRINKER: I don't have any
14 other questions, your Honor.

15 JUDGE DAWSON: Okay. General
16 Counsel 6 was the driving demonstration record
17 or report, rather. And General Counsel 4
18 includes the other employee's discipline. You
19 did not ask that they be admitted into the
20 record.

21 MR. BRINKER: Oh, yes, your Honor.
22 At this time I move that they be admitted.

23 MR. MURPHY: No objections.

24 JUDGE DAWSON: Okay. I'm admitting
25 into the record General Counsel Exhibit 4,

1 which are the discipline of other employees.

2 And it contains -- for different employees.

3 And then General Counsel Exhibit 6 I'm

4 admitting the driver demonstration report.

5 Okay. And do you have any
6 questions, Mr. Murphy?

7 MR. MURPHY: Yes, your Honor.

8 JUDGE DAWSON: Are you ready?

9 MR. MURPHY: Yes, your Honor.

10 CROSS EXAMINATION OF CLYDE FROSLEAR

11 BY MR. MURPHY:

12 Q. Clyde, staying on the last document
13 you were testifying about, which is page 14 of
14 what's been admitted as General Counsel Exhibit
15 4, which is the Bill Huff discipline on March
16 22nd, 2015?

17 A. Yes.

18 Q. And you've testified that this was
19 minor. On March 2nd, 2015, why would this have
20 been considered minor?

21 A. At this point in time, we're trying
22 to make our time clock follow the driver's day
23 versus a logbook. Whereas a logbook, the
24 driver used to be able to do 15 minute
25 increments.

1 Now we're asking them -- we have to
2 get down to the minute. And since it's new,
3 someone walks in, he's accustomed to clocking
4 in. He's allowed seven minutes to clock in or
5 seven minutes after that. He just clocked in a
6 minute too soon.

7 Q. So this was a new procedure at the
8 time?

9 A. Yes.

10 Q. And I'm no math genius. But if I
11 do the math from 8:02 p.m. to 6:59 a.m. I can
12 see how if it were 5:59, it would be a DOT
13 hours of service violation. I'm not good
14 enough at math to figure that out for 6:59.
15 How is this exactly -- given that that's not a
16 10-hour stretch, that's actually an 11-hour
17 stretch, how is that exactly a DOT violation?

18 A. I noticed that. I would agree that
19 this -- that 6:59 is probably a typo. It's
20 probably 5:59. And quite honestly, if we find
21 out that it was 6:59 then this should have
22 never been given.

23 Q. And when did you discover this
24 potential error on this discipline?

25 A. I just happened to notice it as you

1 were saying it.

2 Q. Okay. I'd like to stay on General
3 Counsel's Exhibit 4. And I'd like to start on
4 page 1 -- wait a second here. Go to page 2.
5 This is a written counselling issued to John
6 Bowman on 6/15/2011, correct?

7 A. Yes.

8 Q. What was this for?

9 A. Not practicing GOAL. GOAL is Get
10 Out And Look, to ensure that you're not going
11 to run into something going backwards.

12 Q. Was this his first incident of
13 this?

14 A. Yes.

15 Q. Turn to page 3. This is a
16 discipline issued to Jack Baker on 11/15/2011,
17 correct?

18 A. It is.

19 Q. What was this for?

20 A. Not wearing safety glasses two
21 consecutive days in a row.

22 Q. This is a warning letter. Was this
23 his first incident for this?

24 A. First incident would have been
25 11/14. This is issued on 11/15.

1 Q. Do you have knowledge of whether a
2 verbal tap on the shoulder or a documented
3 verbal was issued on 11/14/2011?

4 A. Dave Luehrmann, on the 15th,
5 mentioned to me on the 14th that he reminded
6 Jack to wear glasses on the 14th.

7 Q. On the next page, Jack Baker,
8 5/17/2012, written warning. What was this for?

9 A. Jack Baker did a few things here.
10 He didn't verify his load that had he had the
11 correct hazardous material on there. So his
12 manifest was wrong. Which is a DOT violation.
13 And also causes problems with charging
14 customers rent.

15 Q. So was this a first offense?

16 A. Yes.

17 Q. This was within one year of Jack
18 Baker's 11/15/2011 discipline, correct?

19 A. Yes. But major -- this is not a
20 minor violation. This is major, going down the
21 road with incorrect paperwork.

22 Q. So do you normally consider things
23 like not wearing safety glasses as a separate
24 line of discipline from something like a DOT
25 violation or a trip load verification?

1 A. Yes.

2 Q. Turn now to page 5. It says "Jack
3 Baker, Date 10/8/2012." Correct?

4 A. Correct.

5 Q. And this was -- what was the level
6 of discipline here?

7 A. Suspension.

8 Q. And what was it for?

9 A. He was out driving the vehicle
10 without a valid medical certificate.

11 Q. And why was this a suspension?

12 A. This is severe. And also because
13 every morning the driver's are supposed to
14 double check that they have all credentials
15 with them before leaving.

16 Q. And was there a written in his file
17 already for a similar incident?

18 A. No.

19 Q. Well, I'd like to refer you back to
20 the previous discipline?

21 A. Oh, I'm sorry.

22 Q. Is that not a similar discipline?

23 A. Yes, it is.

24 Q. So why is the 10/8/2012 discipline
25 a suspension?

1 A. It's progressive discipline.

2 Q. Did you mention progressive
3 discipline in the write up?

4 A. I do not.

5 Q. And do you ever mention progressive
6 discipline in a write up?

7 A. No. I don't believe I do.

8 Q. Okay. Thank you. Turn now to the
9 next page, which I guess is page 6. This is a
10 9/4/2013 discipline for Justin Hollander,
11 correct?

12 A. It is.

13 Q. And what was the level of
14 discipline?

15 A. A verbal counselling.

16 Q. And what was this one for?

17 A. He had, it seemed like he was
18 using, he had grease on his gloves. And he
19 touched the steering wheel. And he got off and
20 he just failed to clean up after himself.

21 Q. Why just a verbal?

22 A. Minor incident.

23 Q. All right. One more document on
24 there. Can you turn to page -- we're on the
25 same exhibit.

1 JUDGE DAWSON: Page 7?

2 MR. MURPHY: No, page 21.

3 Q. This is a -- yes, actually I'd like
4 to go in order. Sorry. Excuse me.

5 JUDGE DAWSON: Excuse me. I have a
6 question for Mr. Froslear. For the record,
7 what is the difference between a written
8 counselling and a written warning? In other
9 words, is a written warning more progressive
10 than a written counselling.

11 THE WITNESS: I would say warning
12 letter, written warning, written counseling
13 equal.

14 JUDGE DAWSON: They're are equal.
15 Okay. Go on Mr. Murphy.

16 Q. You said a written warning and?

17 A. A written counselling and a warning
18 letter are equal.

19 Q. Okay. All right. So it's page 14,
20 excuse me. Page 14. This is a counselling
21 statement issued to Bill Huff. On March 2nd,
22 2015, correct?

23 A. Correct.

24 Q. What was the level of discipline?

25 A. Minor verbal counselling.

1 Q. And what was the violation for?

2 A. Clocking in a few minutes too soon.

3 Q. And then, now turning to the next

4 page -- no. Page up to that -- page 17. This

5 is a counselling statement issued to Steve

6 Rottinghouse on 6/26/15, correct?

7 A. Correct.

8 Q. What was the level of discipline?

9 A. Three days suspension.

10 Q. And what was the offense?

11 A. Deliberately clocking off company
12 time and continuing to work.

13 Q. And what else is identified as a
14 reason for the discipline at the top of the
15 write up.

16 A. Dishonesty in delivery.

17 Q. Okay. And what was the nature of
18 the violation?

19 A. Severe.

20 Q. And was this the first incident?

21 A. Yes.

22 Q. And was this a terminable offense?

23 A. Yes. In fact, I know I was seeking
24 termination and counsel advised me otherwise.

25 Q. And was this discipline subject to

1 NLRB charge? In response to receiving this
2 discipline did Steve Rottinghouse file an
3 unfair labor practice?

4 MR. BRINKER: I'm going to object
5 to relevance.

6 JUDGE DAWSON: You may respond.

7 MR. MURPHY: Isn't that why we're
8 here?

9 MR. BRINKER: Not the -- never
10 mind. I withdraw the objection.

11 JUDGE DAWSON: Okay. Thank you. I
12 was going to overrule the objection anyway
13 because I think it is relevant. But go on.

14 Q. Did Steve Rottinghouse file a Labor
15 Board charge in response to receiving this
16 discipline?

17 A. I believe so.

18 Q. And what happened with that Labor
19 Board charge?

20 A. It was tossed out.

21 Q. Turn now to page 20. This was a
22 counselling statement issued to Matt Kincaid on
23 9/21/15?

24 A. Correct.

25 Q. And what was the level of

1 discipline?

2 A. Verbal counselling for a minor
3 offense. Again, the time clock issue.

4 MR. BRINKER: I'm sorry, which one
5 was this?

6 MR. MURPHY: Page 20.

7 Q. And why was this minor?

8 A. Few minutes.

9 Q. A few minutes or one minute?

10 A. One minute, exactly, yes.

11 Q. And now, page 21, am I correct in
12 characterizing this as a counselling statement
13 issued to Bill Huff on January 25th, 2016?

14 A. That's correct.

15 Q. What was the level of discipline?

16 A. Written counselling.

17 Q. What was the offense?

18 A. Preventable accident.

19 Q. Was this the first offense?

20 A. No.

21 Q. What was the prior offense?

22 A. He had a time clock issue.

23 Insecure load.

24 Q. Okay. Was this the first offense
25 of this type?

1 A. For an accident, yes.

2 Q. Okay. So was this written
3 counselling for a first offense?

4 A. Yes.

5 Q. And why was it a written?

6 A. Severe, preventable accident.

7 Q. Okay. Thank you. All right.

8 Turning now to Joint Exhibit 1. The first
9 page, you previously testified that there's no
10 -- you previously confirmed and testified that
11 there's no mention of progressive discipline on
12 this document. Here's my question. At the
13 time this counselling statement was issued, on
14 8/5/2015, at the time this document was -- yes?

15 JUDGE DAWSON: Some clarification?

16 MR. MURPHY: Sure.

17 JUDGE DAWSON: Look at the
18 counselling statement, Joint Exhibit 1.

19 THE WITNESS: Yes.

20 JUDGE DAWSON: When was it actually
21 issued?

22 THE WITNESS: 8/6, according to the
23 dates here.

24 JUDGE DAWSON: Okay. Thank you. I
25 just wanted -- even though I know 8/5 is the

1 date of the document it was signed by everyone
2 on 8/6. So I just wanted to make that clear.

3 MR. MURPHY: Okay. Thank you.

4 Q. Okay. Actually, turn to Joint
5 Exhibit 6(a) -- which these aren't numbered.
6 So it's kind of like, I don't know, maybe eight
7 pages from the back of this packet of joint
8 exhibits. I'm looking at 6(a). Is this the
9 charge that Mr. Rottinghouse filed against
10 Airgas when he received the suspension for the
11 dishonesty and the DOT working off the clock
12 violation?

13 A. It is.

14 Q. And now turn to page 6(b). Is this
15 the letter dated September 22nd, 2015, where
16 the NLRB dismissed that charge?

17 A. It is.

18 Q. Dated September 22nd, 2015. Okay.
19 Now, turn back to Joint Exhibit 1, the first
20 page. At the time you issued this discipline,
21 was the prior violation for DOT discipline
22 subject to an ongoing NLRB investigation?

23 A. From 8/5 until it was dismissed on
24 September 22nd.

25 Q. Thank you. And then, turn to Joint

1 Exhibit 7. Am I not correct -- was this
2 meeting held before the pending NLRB
3 investigation was resolved in the suspension
4 matter?

5 A. It was.

6 Q. And now, turn to page --

7 JUDGE DAWSON: I'm sorry. What was
8 your question? Joint Exhibit 7 is?

9 MR. MURPHY: Notes from a grievance
10 meeting.

11 JUDGE DAWSON: About the loose
12 cylinders?

13 MR. MURPHY: Yes.

14 JUDGE DAWSON: And what was your
15 question?

16 Q. Did this meeting take place before
17 the NLRB investigation regarding the three day
18 suspension was resolved? And he answered yes.

19 JUDGE DAWSON: Okay.

20 Q. Now, turn to Joint Exhibit 10.
21 That's the last page.

22 A. Yes.

23 Q. What are these notes?

24 A. This would have been the, I believe
25 the second grievance meeting. Which at this

1 time the VA from the local came, Mr. Ron Butts.

2 Q. Okay. If you go halfway down a
3 little bit more on the page, you will see "RB -
4 will you reduce this to a verbal?"

5 A. I do.

6 Q. And what do your notes reflect was
7 your response?

8 A. No. Because it's not Steve's first
9 DOT violation and because of the severity of
10 this event.

11 Q. And did this meeting take place
12 after resolution of the NLRB charge in the
13 prior disciplinary matter, the three day
14 suspension? Or did this meeting take place
15 after resolution?

16 A. Looks like the day after.

17 Q. Okay.

18 MR. MURPHY: I have no further
19 questions for this witness on cross. But I
20 reserve my right to call him as part of my
21 case.

22 JUDGE DAWSON: Yes.

23 MR. MURPHY: Thank you.

24 JUDGE DAWSON: Understood. Do you
25 have any other questions at this time?

1 MR. BRINKER: Yes, your Honor.

2 Very briefly, your Honor.

3 REDIRECT EXAMINATION OF CLYDE FROSLEAR

4 BY MR. BRINKER:

5 Q. If you look at General Counsel's
6 Exhibit 4, on page 2, the written counselling
7 there, this employee ran into a car, correct?

8 A. Yes.

9 Q. Okay. If you look into 21, page
10 21?

11 A. Yes.

12 Q. This employee ran into a building,
13 correct?

14 A. Yes.

15 Q. Okay.

16 JUDGE DAWSON: Is it the same
17 employee?

18 MR. BRINKER: This is a different
19 employee, your Honor.

20 JUDGE DAWSON: Okay.

21 Q. The other thing about this employee
22 -- never mind. I'll withdraw that question.
23 Okay. If you look at 3?

24 JUDGE DAWSON: Page 3?

25 Q. Page 3. As far as you know,

1 there's no written verbal warning here?

2 A. I would have to say back then it
3 was the tap on the back sort of thing, wear
4 your safety glasses.

5 Q. But this employee was given a
6 verbal warning, and then this written warning
7 stems from the second instance, the second
8 violation, correct?

9 A. Are you asking me if there was
10 something documented as far as a verbal
11 warning?

12 Q. No. I'm say this employee, as far
13 as you can recall, received a written warning
14 first and then a written warning after that?

15 A. I would call it just a
16 conversation. I wouldn't call it a verbal
17 warning.

18 Q. Okay. So you had a conversation
19 with the employee about how he was supposed to
20 -- I'm sorry, one of your managers had a
21 conversation with this employee about how he
22 was supposed to wear safety glasses the day
23 before, correct?

24 A. Best I can remember, Dave Luehrmann
25 told me that, hey -- "I know that I told Jack,

1 hey, put your safety glasses on." And he did
2 it a second day in a row. It was more of a
3 heads up.

4 Q. Now, if we can skip forward here to
5 -- number 4, you have Jack Baker. And he
6 received this written warning for going down
7 the road with incorrect paperwork, correct?

8 A. Correct.

9 Q. And this is a DOT violation?

10 A. Yeah, a major violation.

11 Q. Okay. So this is a major violation
12 to go down the road without paperwork?

13 JUDGE DAWSON: What page is this?

14 MR. BRINKER: I'm sorry. Page 4,
15 your Honor.

16 JUDGE DAWSON: Okay.

17 Q. Now, in page 5, you had the same
18 employee, Jack Baker, correct?

19 A. Yes.

20 Q. And it mentions here in his
21 suspension, "This is not the first issue you
22 have had following DOT compliance as an Airgas
23 driver," right?

24 A. It does.

25 Q. So you have in the past indicated

1 when employees have had problems, consistent
2 problems with DOT regulations?

3 MR. MURPHY: Objection to the
4 characterization of "consistent" -- withdrawn.
5 I just saw the word. Withdrawn. Sorry.

6 Q. Let's go to page 7. If you look
7 here under "Recommended Correction Action," do
8 you see that in bold?

9 A. I do.

10 Q. In the second paragraph in there,
11 it says, "As mentioned on your verbal warning
12 issued to you on 9/5/13," correct?

13 A. Yes. I see that.

14 Q. So this employee received a written
15 warning after already receiving a verbal
16 warning for a safety violation, correct?

17 A. First offense being minor, and then
18 continuing making safety violations.

19 Q. What's the difference between a
20 minor DOT violation and a major violation?

21 A. If I should see you moving a
22 cylinder, and you don't have a glove on. Or
23 you don't have your safety glasses on walking
24 out of the breakroom.

25 Q. Is that a DOT violation?

1 A. No.

2 Q. So what's the difference between a
3 minor DOT violation and a major DOT violation?

4 A. Are we talking about these two?

5 Q. I'm talking about generally
6 speaking, at the Respondent, at your company,
7 what's the difference -- here's a better
8 question. Who decides what's a major DOT
9 violation and a minor DOT violation?

10 A. After investigating, I come to that
11 conclusion. Then I talk it over with counsel.

12 Q. Would it be a major violation if
13 the company had to spend thousands of dollars
14 in fines?

15 A. As a DOT violation?

16 Q. As a DOT violation.

17 A. No. That's out of our pocket.

18 Q. But would that be a major violation
19 if that occurred?

20 A. Not the first time around, no.

21 Q. So was anyone charged any money for
22 these leaning cylinders?

23 A. No.

24 Q. Was the company cited by the
25 Department of Transportation at all?

1 A. No.

2 Q. Did the employee drive off the lot
3 with these cylinders strapped in this way?

4 A. Yes. He was off the lot --

5 Q. Did he drive off the lot with the
6 cylinders in this way?

7 A. Drive off the lot? No. Came back
8 from the lot.

9 Q. Now, you mentioned a -- your
10 counsel mentioned an NLRB investigation charge
11 155497. Which is Joint Exhibit 6(a). If we
12 could go to Joint Exhibit 5(a) -- and this will
13 be very brief -- could you identify what this
14 document is?

15 A. "Threaten to change employees terms
16 and condition of employment because Charging
17 Party files grievances and files charges with
18 the NLRB."

19 Q. Okay. Now, this charge alleges a
20 violation for threatening to change the
21 employee's terms and conditions of employment.
22 And this stemmed from the meeting on April
23 28th, correct?

24 A. Correct.

25 Q. And what was the result of this

1 NLRB investigation, if you remember?

2 A. Excuse me. But I don't know the
3 official term for what we did.

4 Q. Would it be safe to say you entered
5 into a settlement agreement?

6 A. I'll trust you that that's what
7 this means.

8 Q. Could you look at Joint Exhibit
9 5(c)?

10 A. 5(c), okay.

11 Q. At the top it says, "Settlement
12 Agreement"?

13 A. 5(c)?

14 Q. Yes. Joint Exhibit 5(c).

15 A. Okay. Yes.

16 Q. And page 2 of that document, it
17 says, "Charged Party, Airgas USA, Michael C.
18 Murphy," that is your labor counsel, correct?

19 A. Correct.

20 Q. If you go to the next page, which
21 is Joint Exhibit 5(d)?

22 A. Yes.

23 Q. Could you identify what this
24 document is?

25 A. Yes. It was a notice that I had to

1 post from a date to a date.

2 Q. Okay. And the third paragraph, it
3 says, "We will not threaten to change how we
4 enforce our disciplinary procedure because you
5 file charges with the National Labor Relations
6 Board or because" --

7 MR. MURPHY: I'm going to object as
8 to relevance. There's no 883 alleged in this
9 case at this time.

10 MR. BRINKER: This is not an 883
11 violation. This is an independent 881
12 violation covering threatening to change the
13 terms and conditions --

14 MR. MURPHY: That's not what we're
15 litigating. We're not litigating this case.
16 This case was settled. And it was settled
17 pursuant to an alleged violation of a prior
18 settlement agreement. We're not litigating now
19 whether he threatened to change working --

20 JUDGE DAWSON: Wait a minute.

21 MR. BRINKER: It's being used to
22 establish animus, your Honor.

23 JUDGE DAWSON: Okay. I'm going to
24 overrule the objection. But I will say that
25 these have been admitted and they speak for

1 themselves. And it is obviously a settlement
2 agreement.

3 MR. BRINKER: Yes, your Honor. I
4 have no further questions for this witness.

5 MR. MURPHY: Just real fast on
6 recross, please, your Honor?

7 JUDGE DAWSON: Okay.

8 RECROSS EXAMINATION OF CLYDE FROSLEAR

9 BY MR. MURPHY:

10 Q. You just testified on redirect that
11 the incident at issue in this case with the
12 unsecured load did not result in a DOT
13 violation?

14 A. Correct.

15 Q. Could this have -- could this
16 situation have resulted in a DOT --

17 A. Absolutely.

18 Q. And exactly what kind of DOT
19 violation could this have resulted in?

20 A. If the DOT would have found this on
21 the roadside they would've, what they call --
22 they'd make you pull over and you can't move.

23 Q. Is that called an out-of-service --

24 A. Out-of-service, yes. They make you
25 pull over until this problem is corrected.

1 They then send you on your merry way.

2 Q. And would that out-of-service
3 violation be on the Employer, Airgas' permanent
4 record with the Department of Transportation?

5 A. And the driver.

6 Q. And the driver?

7 A. Yes.

8 MR. MURPHY: Okay. Thanks.
9 Nothing further.

10 JUDGE DAWSON: Okay, if there are
11 no more questions at this time for you, Mr.
12 Froslear, you may step down from the witness
13 seat and return to your seat beside Mr. Murphy.

14 THE WITNESS: Thank you.

15 JUDGE DAWSON: And remember, sir,
16 not to discuss your testimony or questions
17 asked with anyone outside of this hearing room.

18 MR. MURPHY: Your Honor, may we go
19 off the record for a minute?

20 JUDGE DAWSON: Yes. We need to go
21 off the record.

22 (Off the record.)

23 JUDGE DAWSON: Back on the record.

24 We have our next witness. And sir, what is
25 your name, please?

1 THE WITNESS: It's David Luehrmann,
2 L-U-E-H-R-M-A-N-N.

3 JUDGE DAWSON: And, sir, would you
4 raise you're right hand, please?
5 (Whereupon,

6 DAVID LUEHRMANN
7 Was called as a witness by and on behalf of the
8 Charging Party and, after having been duly
9 sworn, was examined and testified as follows:)

10 JUDGE DAWSON: Thank you. You may
11 lower your hand. And I'm sorry, would you
12 spell your last name again?

13 THE WITNESS: It's
14 L-U-E-H-R-M-A-N-N.

15 JUDGE DAWSON: Okay. Thank you.
16 And Mr. Brinker, you have questions for Mr.
17 Luehrmann?

18 MR. BRINKER: Yes, your Honor.
19 Your Honor, I would like to make a note that
20 Mr. Luehrmann is an adverse witness. He is a
21 supervisor with the Employer.

22 JUDGE DAWSON: Okay.

23 Q. Good morning, Mr. Luehrmann. Could
24 you please explain your position with Airgas?

25 A. The facility plant manager.

1 Q. And what do you do as the -- you
2 said facility plant manager?

3 A. Yes.

4 Q. What do you do in that position?

5 A. Manage the plant and people.

6 Q. Are you the one who typically
7 issues discipline to the employees?

8 A. Yes.

9 Q. How often does Mr. Clyde Froslear
10 handle discipline?

11 A. He's part of it also. He's my
12 boss. He's the operations manager.

13 Q. Is he involved in every discipline
14 or just some of them?

15 A. Every.

16 Q. He's involved in every one. So
17 does he sign off on them or is it more that he
18 is just, you talk to him and consult with him
19 about it?

20 A. Consult with him.

21 Q. Okay. Do you remember providing an
22 affidavit to an agent of the National Labor
23 Relations Board last year regarding a meeting
24 you held in which Mr. Froslear spoke about
25 Airgas's discipline policy?

1 A. Yes.

2 Q. And you testified in that affidavit
3 that the reason Mr. Froslear spoke with the
4 employees that day was to make sure they
5 understood the disciplinary process, correct?

6 A. Yes.

7 Q. And during that meeting, he
8 reiterated that an employee would receive a
9 verbal warning upon the first infraction of a
10 rule. And then a written warning upon a second
11 infraction of the same, rule, correct?

12 A. Well, it was a hypothetical. For
13 example, I believe safety glasses was used,
14 which is a minor. And we would go up to the
15 employee and tell them put their safety glasses
16 on. And then noticed after afterwards that the
17 same employee did the same thing, it would be a
18 written warning.

19 Q. Okay. Would being involved in an
20 accident with a vehicle, would that be a minor
21 violation or a major violation?

22 A. Major violation.

23 Q. Okay. I'm going to hand you what
24 has been previously marked as General Counsel's
25 Exhibit 3. Your Honor, may I approach the

1 witness?

2 JUDGE DAWSON: Yes.

3 - - - - -

4 (Thereupon, General Counsel Exhibit
5 3, Confidential Witness Affidavit,
6 was marked for purposes of
7 identification.)

8 - - - - -

9 Q. Can you identify what this document
10 is?

11 A. It was my affidavit, I guess.

12 Q. And you provided this affidavit to
13 a member -- I'm sorry, someone from the Labor
14 Board?

15 A. Yes.

16 Q. And that's your initials on each of
17 those pages?

18 A. Yes.

19 Q. And your signature at the end?

20 A. Yes.

21 Q. Okay. Here on line 6 of page 2, it
22 says that is "The same disciplinary process
23 that has always been in place. Froslear simply
24 wanted to make sure all the employees
25 understood it." So you're alleging by this

1 statement that nothing was being changed as far
2 as how disciplinary procedures are being
3 enforced, correct?

4 A. Yes.

5 Q. Okay. I'm going to hand you
6 another document. If you could, this is marked
7 General Counsel's Exhibit 7.

8 MR. BRINKER: Your Honor, I may I
9 approach one more time?

10 JUDGE DAWSON: Yes.

11 - - - - -

12 (Thereupon, General Counsel Exhibit
13 7, Typed Verbal Warning, was marked
14 for purposes of identification.)

15 - - - - -

16 Q. Do you recognize this document?

17 A. Yes.

18 Q. Could you tell me what this is?

19 A. A verbal warning.

20 Q. And this is to who?

21 A. John Jeffries.

22 Q. So this was for a backing accident.
23 Would that mean that his vehicle ran into
24 something else?

25 A. Yes.

1 Q. Okay.

2 MR. BRINKER: No more questions for
3 this witness on direct, your Honor.

4 JUDGE DAWSON: Do you have any
5 questions for this witness?

6 MR. MURPHY: Just a few.

7 CROSS EXAMINATION OF DAVID LUEHRMANN

8 BY MR. MURPHY:

9 Q. In preparation for this hearing in
10 response to General Counsel's subpoena, did
11 Clyde ask you for all relevant disciplines
12 going back to January 1st, 2013?

13 A. Yes.

14 Q. Did you turn this one over to him
15 as part of that?

16 A. I thought so.

17 Q. Okay. Why is this in a different
18 format than all the other ones? Why is it like
19 this, instead of on one of the regular forms?

20 A. It's just a verbal warning, show
21 that we did it verbal.

22 Q. Did you do -- was this one -- is
23 the normal procedure to get Clyde's approval
24 before issuing a discipline?

25 A. Yes.

1 Q. Did you do that in this case?

2 A. I do not recall.

3 Q. Is the normal procedure to make
4 sure that counselling statements are vetted by
5 human resources and put on the correct form?

6 A. Yes.

7 Q. Did you do that in this case?

8 A. Did not.

9 Q. Do you recall why you did not
10 follow standard procedures in issuing this
11 discipline?

12 A. No, I do not.

13 MR. MURPHY: Nothing further.

14 JUDGE DAWSON: And I'm not sure
15 that it's relevant.

16 MR. MURPHY: I'm not either. I'm
17 concerned that I didn't respond in full to the
18 subpoena. And I'm trying to find out why.

19 JUDGE DAWSON: Okay.

20 MR. MURPHY: But I don't have
21 anything else.

22 JUDGE DAWSON: Okay. I don't have
23 any questions.

24 MR. BRINKER: I do have one
25 question on redirect.

1 JUDGE DAWSON: Yes.

2 REDIRECT EXAMINATION OF DAVID LUEHRMANN

3 BY BRINKER:

4 Q. Up on the stand, there, you should
5 have a document that's marked on the first
6 page, it should say GC X 4 on the bottom, which
7 is General Counsel's Exhibit 4?

8 A. GC X 3?

9 Q. It should be after that.

10 JUDGE DAWSON: What page? Is that
11 the one with the pages?

12 MR. BRINKER: Yeah. The front
13 page, it says "Counselling Statement. Airgas,"
14 at the top.

15 JUDGE DAWSON: Oh, you hadn't said
16 a page yet. It looks like this? He doesn't
17 have it.

18 Q. And then, just very briefly, if you
19 could go to page 9, this isn't on any official
20 Airgas form, correct?

21 A. No.

22 Q. But it still is a written -- some
23 sort of written warning or notice to an
24 employee, that was in the employee's file,
25 correct?

1 A. Yes.

2 MR. BRINKER: Okay. That's the
3 only question I had, your Honor.

4 MR. MURPHY: I have just one or two
5 questions on recross.

6 JUDGE DAWSON: Okay.

7 RECROSS EXAMINATION OF DAVID LUEHRMANN
8 BY MURPHY:

9 Q. Staying on this page 9, whose
10 signature is that?

11 A. Mine.

12 Q. Okay. Have you ever seen this
13 document before?

14 A. Yes.

15 Q. Were you involved in this?

16 A. No.

17 Q. Okay. Is this -- does this say
18 verbal warning anywhere on it?

19 A. No.

20 Q. Okay. Is this a conversation, is
21 this a conversation, is this a note that
22 followed about a conversation?

23 A. Yes.

24 MR. MURPHY: That's it. Nothing
25 further.

1 JUDGE DAWSON: I have a question.
2 Is it a concern when employees have accidents
3 with their trucks or back into something with a
4 truck?

5 THE WITNESS: Very concerning.

6 JUDGE DAWSON: Why is that
7 concerning?

8 THE WITNESS: Safety. Property
9 damage. We do a lot of training.

10 JUDGE DAWSON: Okay. I don't have
11 any questions.

12 MR. BRINKER: No further questions.

13 JUDGE DAWSON: Okay. Sir, you may
14 be excused. I will direct you not to discuss
15 your testimony or questions asked with anyone.
16 You may be excused. Thank you.

17 Do you want this admitted into the
18 record, Exhibit --

19 MR. BRINKER: I apologize. Yes,
20 your Honor. At this point I'd like to move to
21 have General Counsel's Exhibit 7 moved into
22 evidence.

23 MR. MURPHY: No objection.

24 JUDGE DAWSON: I'm admitting into
25 the record General Counsel Exhibit 7. It's a

1 verbal warning for John Jeffries.

2 And the affidavit of the witness we
3 just had? Do you want to admit Mr. Luehrmann's
4 --

5 MR. BRINKER: Yes, your Honor.
6 I'll move to admit Mr. Luehrmann's affidavit as
7 well, General Counsel's Exhibit 3.

8 JUDGE DAWSON: Okay. There are no
9 objections, I'm admitting that into the record
10 as well, General Counsel's Exhibit 3.

11 Now we can go off the record.

12 (Off the record.)

13 JUDGE DAWSON: We can go on the
14 record. We are back on the record. We have
15 the next witness that Mr. Brinker is calling as
16 an adverse witness, a 611C witness. And, sir,
17 would you raise you're right hand, please?
18 (Whereupon,

19 MARK MacBRIDE
20 Was called as a witness by and on behalf of the
21 Charging Party and, after having been duly
22 sworn, was examined and testified as follows:)

23 JUDGE DAWSON: Thank you. You may
24 lower your hand and state your full name and
25 spell it for the record.

1 THE WITNESS: Mark F. MacBride.

2 M-A-C-B-R-I-D-E.

3 JUDGE DAWSON: Thank you, sir. And
4 Mr. Brinker is going to ask you questions. I
5 just want to say for the record I'm hoping --
6 there appeared to be a misunderstanding about
7 the calling of the witness as an adverse
8 witness. There wasn't a subpoena issued. And
9 my suggestion was, if the parties can agree,
10 that Mr. Brinker would be allowed to do a
11 subpoena and I would grant it. But the witness
12 is here. So I believe the parties came to some
13 agreement.

14 MR. BRINKER: Yes, your Honor.

15 MR. MURPHY: In the interest of
16 time.

17 JUDGE DAWSON: In the interest of
18 time. Thank you. Because I was not going to
19 spend a lot of time arguing about it. Because
20 we do need to move along. So you may proceed,
21 Mr. Brinker.

22 MR. BRINKER: Yes, your Honor.
23 Thank you.

24 Q. Good afternoon, Mr. MacBride. If
25 you could take a look at what has been marked

1 as Joint Exhibit 3 in front of you. I'm not
2 sure if everything's still in order. But it
3 should say Joint EX 3?

4 A. Okay. Confidential Witness
5 Affidavit?

6 Q. No. That says GC 3.

7 A. Okay.

8 JUDGE DAWSON: It says Joint
9 Exhibit 3.

10 A. Okay. I have it.

11 Q. Well, first of all, before we get
12 to it, keep that in front of you. What is your
13 position with the employer?

14 A. I'm a driver trainer for great
15 lakes. Great lakes region.

16 Q. Okay. And great lakes region
17 includes the Airgas facility on Cincinnati
18 Dayton Road?

19 A. Correct.

20 Q. And if you look at Joint Exhibit 3,
21 could you tell me what this document is?

22 A. This is -- the beginning of it? Or
23 do you want me to start from the beginning?

24 Q. Just generally identify what it is.

25 A. This is an email transaction

1 between myself and the client.

2 Q. And if you look at this, I believe
3 on page 2, at the bottom, it reads from bottom
4 up, you say at first, "Not good. Did the
5 driver catch it before leaving and did it get
6 fixed before leaving?" What is this in --
7 referring to?

8 MR. MURPHY: Objection. Which
9 statement? He read two statements.

10 JUDGE DAWSON: I'll sustain the
11 objection. If you can clarify which --

12 Q. Okay. You said -- let's back up,
13 here. The very first thing chronologically,
14 which is on the last page, bottom of the last
15 page. On 3, it says, "What do you think about
16 this? Look good to you?" And it says,
17 IMG_027.JPG. What picture is this referring
18 to?

19 A. I believe it's referring to the one
20 up on the screen.

21 Q. So for the record, you're referring
22 to what's marked as General Counsel's Exhibit
23 2, if you look in your packet there?

24 MR. MURPHY: It's Joint Exhibit 2.

25 MR. BRINKER: I'm sorry, Joint

1 Exhibit 2.

2 Q. Yes. Is that the image that was
3 sent to you?

4 A. Yes.

5 Q. Is there any conversation about
6 this picture will before August 4th, 2015 at
7 704 a.m.? Or is this the first time you saw
8 it?

9 A. It's the first time I saw it.

10 Q. Now, you then responded, "No. With
11 the cylinders being offset, we would be hit for
12 an insecure load just by how it looks. Where
13 is this truck?" What were you trying to find
14 out at that point?

15 A. What was I trying to find out?

16 Q. Correct, with that response.

17 A. I wanted to know if this was a
18 roadside inspection. If we'd been stopped. I
19 was wondering if this might be on a roadside
20 inspection, if we'd been stopped by law
21 enforcement.

22 Q. Okay. And said -- I'm sorry, Mr.
23 Froslear's response was "Cin Day." What did he
24 mean by that?

25 A. My opinion is he meant it's at the

1 plant at Cincinnati Dayton Road.

2 Q. And you're referring to the
3 facility on Cincinnati Dayton Road?

4 A. Yes.

5 Q. And you responded, "Not good. Did
6 the driver catch it before leaving?" Right?

7 A. Right.

8 Q. And why were you asking this?

9 A. Because if one of our drivers
10 pulled off onto the road with a cylinder that
11 looked like that, we'd have an issue.

12 Q. And Mr. Froslear responded by
13 saying, "I saw it when he pulled into the
14 yard," right?

15 A. Yeah.

16 Q. And then your response after that
17 was -- I'm sorry. Then your next question was,
18 "Did it get fixed before leaving?" Correct?

19 A. Correct.

20 Q. Okay. Why were you so concerned
21 about whether or not it was fixed before the
22 truck left the parking lot?

23 A. If this was loaded by one of our
24 guys in the yard, I'd hope our driver did his
25 load -- the way we check our load before we

1 leave, and fixed it before he left the yard.

2 Q. And at this point, you didn't have
3 any of the background or context of this
4 picture, correct?

5 A. No.

6 Q. And that's why you were asking
7 these questions because you didn't have any
8 context?

9 A. Correct.

10 Q. Is it possible, and I'm speaking
11 more generally now, is it possible for a load
12 to be secure but when a driver is forced to
13 apply his brakes that the cylinders shift
14 forward like in this picture?

15 A. It's an insecure load.

16 Q. Okay. Is it possible that for a
17 load to be secure and still -- the cylinders
18 shift?

19 A. It's classified as insecure. If
20 your cylinders can move whatsoever it's an
21 insecure load.

22 Q. And are drivers who haul cylinders
23 over long distances taught to check their loads
24 periodically?

25 A. Every 50 miles.

1 Q. And why are they taught to check
2 their loads periodically?

3 A. To make sure that your cylinders
4 don't loosen up or something happened.

5 Q. And if a driver would notice that
6 the cylinders started to loosen what is it that
7 you're supposed to do?

8 A. You're supposed to stop and secure
9 the load.

10 Q. Could this happen -- I'm sorry, is
11 it possible that the ratchet straps on a
12 cylinder over time could work their way up or
13 down on a cylinder?

14 A. The way that's strapped, yes.

15 Q. Is it possible that ratchet straps,
16 even if they are strapped correctly could work
17 their way up or down on a cylinder?

18 A. A lot less possible.

19 Q. But it is possible?

20 A. I'd have to say yes.

21 Q. I'm sorry, that was a yes?

22 A. Yes.

23 Q. And it's possible that if the
24 ratchet straps are ratcheted correctly and they
25 move up or down on their cylinder, the driver

1 is supposed to then readjust the straps as soon
2 as they notice it, correct?

3 A. Absolutely.

4 Q. And so this could happen even if
5 the driver hasn't necessarily done something
6 wrong?

7 A. Yes.

8 Q. Okay. So it's not unheard of for a
9 load of cylinders to shift slightly without
10 necessarily being unsecure?

11 MR. MURPHY: Objection to the
12 characterization of not necessarily unsecure.
13 The witness has already testified that if they
14 move at all the load is unsecure.

15 JUDGE DAWSON: I'm going to
16 overrule the objection. And you can answer the
17 question.

18 Q. Would you like me to read it again?

19 A. Yeah. Please.

20 Q. So it's not unheard of for a load
21 of cylinders to shift slightly without
22 necessarily being unsecured?

23 A. To shift slightly would probably --
24 I can't say no. But it does not happen on a
25 standard basis.

1 Q. It doesn't happen on a regular
2 basis?

3 A. No.

4 Q. But it is possible for it to shift
5 slightly even though the driver hasn't done
6 anything wrong?

7 A. The standard to get our cylinders
8 to move something has to happen, sir. If you
9 strap your cylinders correctly on the truck and
10 you stop on a normal basis or you -- our
11 cylinders do not move. We handle thousands of
12 them a day.

13 Q. So if a driver had to make a sudden
14 stop when pulling into a parking lot and then
15 went to check the loads and noticed that the
16 cylinders weren't perfectly straight anymore
17 what is the driver supposed to do?

18 A. That's -- it could happen. I'm
19 saying that. But, I mean, hard stops, this and
20 that, that will happen.

21 Q. But what are they supposed to do at
22 that point?

23 A. Get out and fix your cylinders.

24 Q. Is there a difference in your
25 opinion if a driver is leaving a facility with

1 a load looking like the picture there, Joint
2 Exhibit 2, leaving a facility like that and
3 when -- if those bottles look like that after a
4 sudden stop, is there a difference between a
5 driver leaving an Airgas facility with the
6 bottles looking like that and if they make a
7 sudden stop while going into the facility and
8 they move like that, is there a difference?

9 A. Yes.

10 Q. Okay. Would you say that if this
11 is what Mr. Rottinghouse did, if he went up on
12 the truck and fixed these cylinders as soon as
13 he noticed the problem, he did the right thing?

14 A. Yes.

15 Q. Do you remember discussing this
16 incident with Mr. Rottinghouse a few weeks
17 after it occurred?

18 A. Really, the first time I remember
19 talking directly about this with Mr.
20 Rottinghouse was November 9th.

21 Q. So that was a few weeks after --

22 A. Yeah.

23 Q. And when you talked to Mr.
24 Rottinghouse, did you discuss the email traffic
25 that we talked about in Joint Exhibit 3?

1 A. Not the email traffic. I was
2 brought into a conversation that I didn't know
3 if this was Mr. Rottinghouse when this email
4 arrived. I didn't know who it was. I was
5 asking questions. And I answered the question
6 to the best of my ability.

7 Q. When you talked to Mr.
8 Rottinghouse, did you explain that you did not
9 know any of these mitigating factors?

10 MR. MURPHY: Objection.

11 JUDGE DAWSON: What is your
12 objection?

13 MR. MURPHY: "Any of these
14 mitigating factors." He's going to potentially
15 give an affirmative response to something where
16 he doesn't understand what mitigating factors.

17 MR. BRINKER: I'm referring to the
18 mitigating factors that we've just been going
19 over for the last five minutes.

20 JUDGE DAWSON: I'm going to
21 overrule the objection. Go on.

22 Q. Did you explain to him that when
23 Mr. Froslear asked your opinion via email that
24 you did not know any these mitigating factors?

25 A. When I got this email, I was asked

1 the question straight out, "What does this look
2 like to you?" I said it's an unsecure load.
3 That's what I answered.

4 Q. When you explained it to Mr.
5 Rottinghouse, did you explain to him that you
6 did not know any of these mitigating factors,
7 for example, you did not know about that he had
8 to make a hard stop before --

9 A. No, I did not know that. No.

10 Q. And you did not know that as soon
11 as he made that hard stop, the next thing he
12 did after parking the truck and going inside,
13 before he left the facility he checked the
14 cylinders. Did you know that?

15 A. No.

16 Q. Would you agree that when this
17 picture is put into context it is possible Mr.
18 Rottinghouse did not do anything wrong?

19 A. In my opinion, if our cylinders
20 moved it's an unsecure load. And that's a
21 problem. Again, mitigating factors, if there
22 is a hard stop, there was an accident and
23 something moves, that's something different. I
24 can't speak to that. I just looked at the
25 picture and that's all I can --

1 MR. BRINKER: Okay. I think that's
2 all the questions I have for you at this time.

3 JUDGE DAWSON: Any questions, Mr.
4 Murphy?

5 MR. MURPHY: Yes. I need a moment,
6 though, please.

7 JUDGE DAWSON: We can go off the
8 record.

9 (Off the record.)

10 JUDGE DAWSON: Back on the record,
11 please. You may proceed, sir.

12 CROSS EXAMINATION OF MARK MacBRIDE

13 BY MR. MURPHY:

14 Q. All right, Mark. In your
15 experience, if a driver is checking his
16 cylinders every 50 miles, would one instance of
17 hard braking cause a shift of cylinders of that
18 amount?

19 A. If you can walk up and grab a
20 cylinder, that should not move. If they don't
21 move they should not move.

22 Q. If they don't move they should not
23 move?

24 A. If they're bound tight they should
25 not move.

1 Q. Even if you hard break?

2 A. In my opinion, they should not
3 move.

4 Q. Are those nested properly in that
5 picture?

6 A. No. They are not.

7 Q. Why not?

8 A. All our cylinders are supposed to
9 have three points of contact. The back row,
10 they should be brought into a tighter formation
11 to solidify themselves. That's the way we
12 teach it.

13 Q. In your opinion, could one instance
14 of hard braking cause the lower strap to tilt
15 as much as it does, to ride up the front of
16 those cylinders as much as it has in this
17 picture?

18 A. It's not the hard braking. It's
19 the way the strap is thrown over the back of
20 the pallet.

21 Q. So in your opinion the strap is
22 thrown over the back of the pallet incorrectly?

23 A. Correct.

24 Q. And that has nothing to do with the
25 fact that he may or may not have hard braked in

1 entering the yard?

2 A. No.

3 Q. So to be clear, regardless of
4 whether he hard braked, those are improperly
5 strapped?

6 A. Correct.

7 Q. In this conversation that counsel
8 for the General Counsel asked you about with
9 Mr. Rottinghouse, did Mr. Rottinghouse admit at
10 any point to not strapping the cylinders
11 correctly?

12 A. He didn't come out and admit it.
13 He kept questioning me if this happened or that
14 happened. I said, "Steve, the cylinders need
15 to be strapped. If they moved it's an unsecure
16 load. That's all there is to it."

17 Q. And just to be clear, when you gave
18 your opinion about these cylinders being
19 improperly strapped, the load being insecure,
20 you did not at any time know who was
21 responsible for the improperly strapped
22 cylinders?

23 A. That's correct. I had no idea.

24 Q. Should an Airgas driver ever enter
25 a public way with cylinders strapped like that?

1 A. No, they should not.

2 Q. Why not?

3 A. It would be an insecure load. And
4 at that point if a law officer gets on that
5 truck you're going to be put out of service for
6 an out-of-service violation.

7 Q. And is that because, among other
8 things, the lower strap is improperly placed?

9 MR. BRINKER: Objection, leading.

10 Q. Why?

11 A. My opinion, the lower strap is not
12 where it should be. They're not nested
13 properly. Cylinders need to be nested on three
14 points of contact as much as possible, from the
15 straps.

16 Q. What are the top out-of-service
17 violations in the industry?

18 A. Brakes out of adjustment. And the
19 next one is cylinders that are unsecured load.

20 Q. If an inspecting officer saw
21 cylinders strapped like this on a public way
22 what would the violation be?

23 A. It would be out-of-service for
24 unsecured load. He would pull the driver over.

25 Q. And what would that out-of-service

1 violation mean for Airgas?

2 A. It would go on our CSA and our
3 federal motor carrier score across the country.
4 It would apply to 5,500 drivers.

5 MR. BRINKER: I'm going to object.
6 Calls for speculation.

7 JUDGE DAWSON: And what is CSA?

8 THE WITNESS: It's the grade card
9 for what our drivers and our plant are grade
10 on.

11 JUDGE DAWSON: What does CSA stand
12 for, if you know?

13 THE WITNESS: I do know what it is.
14 But since you just asked me that --

15 JUDGE DAWSON: That's fine. And
16 I'm overruling your objection because both of
17 you have asked speculative questions in this.
18 I'm overruling the objection.

19 MR. MURPHY: CSA is in the packet
20 somewhere.

21 A. I know exactly what it is. And I
22 can't bring it to my -- I was just training on
23 it yesterday.

24 Q. So I think you answered the
25 question.

1 A. We have a running score card for
2 our drivers, such as our suppliers.

3 Q. And what would the out-of-service
4 violation mean for the driver?

5 A. It would be severity of about a
6 two. It would carry a three-year penalty on
7 the driver. And it would carry a three-year
8 penalty on the company. And it's points
9 against you. And at that point it also puts a
10 light on the company that their next vehicles,
11 that's what they start looking for, for future
12 violations.

13 JUDGE DAWSON: And is that
14 speculative or are those the rules?

15 THE WITNESS: Those are the rules.

16 JUDGE DAWSON: The DOT rules,
17 Department of Transportation rules?

18 THE WITNESS: Yes.

19 Q. Did Clyde ever complain to you that
20 Mr. Rottinghouse filed too many labor practice
21 charges?

22 A. No, he did not.

23 Q. Would similarly strapped cylinders,
24 if viewed by management, ever result in the
25 non-issuance of discipline?

1 A. No.

2 Q. Is Mr. Rottinghouse a good driver?

3 A. Mr. Rottinghouse is a very good
4 driver.

5 Q. And is it in Airgas' interest to
6 retain good drivers?

7 A. Absolutely.

8 Q. Why?

9 A. There's a driver shortage
10 throughout the country. And good people are
11 hard to find. We put a lot of training into
12 Mr. Rottinghouse. And he's a very good driver.
13 He knows the truck, knows the job. I think
14 he's a good driver.

15 MR. MURPHY: Thank you. Nothing
16 further.

17 THE WITNESS: I can tell you what
18 CSA stands for now. Oh, I just had it. Safety
19 and accountability are the last two.

20 JUDGE DAWSON: That's fine. If we
21 find it, we'll do it. Sir, Mr. MacBride, I
22 will direct that you not discuss your testimony
23 or questions asked with anyone. And I'm sorry,
24 Mr. Brinker, I was assuming you didn't have any
25 other questions.

1 MR. BRINKER: I just have one
2 question, your Honor.

3 JUDGE DAWSON: I'm sorry. Go on
4 and ask.

5 REDIRECT EXAMINATION OF MARK MacBRIDE

6 BY MR. BRINKER:

7 Q. You mentioned before that to
8 determine if something is insecure, that's done
9 by if you walk up and grab the cylinder it
10 should not move?

11 A. Correct.

12 Q. Is it possible to know that it's
13 not secure without actually seeing if it moved?

14 A. I don't believe so.

15 Q. Okay.

16 MR. BRINKER: That's the only
17 question I have.

18 MR. MURPHY: One question on
19 recross, please?

20 JUDGE DAWSON: Go on.

21 EXAMINATION OF MARK MacBRIDE

22 BY MR. MURPHY:

23 Q. But if you did see it move, then
24 it's clearly?

25 A. Unsecure.

1 Q. Unsecure. Thank you.

2 JUDGE DAWSON: Okay. Now,
3 Mr. MacBride, I would direct that you not
4 discuss your questions or the answers that
5 you've given with anyone. You may be excused,
6 sir. Thank you.

7 We can go off the record.

8 (Off the record.)

9 JUDGE DAWSON: We can go on the
10 record while I swear the witness in. Sir,
11 state your name please.

12 THE WITNESS: Steven Wayne
13 Rottinghouse, Jr.

14 JUDGE DAWSON: And raise your right
15 hand please.

16 (Whereupon,

17 STEVEN WAYNE ROTTINGHOUSE, JR.
18 Was called as a witness by and on behalf of the
19 Charging Party and, after having been duly
20 sworn, was examined and testified as follows:)

21 JUDGE DAWSON: You may lower your
22 hand. And we can go off the record.

23 (Off the record.)

24 JUDGE DAWSON: We can go back on
25 the record. And we have the first witness for

1 the General Counsel, the 611C or adverse
2 witness and Mr. Rottinghouse, the Charging
3 Party. So you may proceed, sir.

4 MR. BRINKER: Yes, your Honor.

5 Q. Good morning, Mr. Rottinghouse,
6 could you please introduce yourself and spell
7 your name for the court reporter?

8 A. My name is Steven W. Rottinghouse,
9 R-O-T-T-I-N-G-H-O-U-S-E, Jr.

10 JUDGE DAWSON: And Steven is
11 S-T-E-V-E-N.

12 A. Correct.

13 Q. And Mr. Rottinghouse, what do you
14 do for a living?

15 A. I'm a truck driver for Airgas.

16 Q. And, at work, do you supervise
17 anyone?

18 A. No.

19 Q. What is your involvement with
20 Teamsters Local 100?

21 A. I am a current member.

22 Q. What offices have you held with the
23 Union?

24 A. None.

25 Q. As you may know, we've already

1 stipulated that you have previously filed
2 charges with the NLRB. And that you
3 participated in those investigations to include
4 providing affidavits to the Labor Board. So we
5 are not going to go into the details of all
6 those charges.

7 However, I did want to touch on a
8 few things that led up to the incident on
9 August 3rd for which you were disciplined.
10 Could you tell me about the discipline you
11 received from the Employer in about July of
12 2015?

13 A. July of 2015 was a three-day
14 suspension I received for working off the
15 clock.

16 Q. Okay. And did you file a grievance
17 over this discipline?

18 A. Yeah.

19 Q. And did you file charges with the
20 Labor Board?

21 A. Yes.

22 Q. Do you remember when the Labor
23 Board charges were dismissed?

24 A. I don't remember exactly.

25 JUDGE DAWSON: We have that

1 information.

2 MR. BRINKER: Yes, your Honor.

3 Q. Do you remember when your grievance
4 was denied?

5 A. I think it was in August, when we
6 had the meeting.

7 Q. Tell the court about what happened
8 on August 3rd, 2015?

9 A. On August 3rd, 2015, I was being
10 trained that day on the crane truck. We have
11 crane stops that require a specific truck to
12 lift pallets on and off the truck. And Bob
13 Oestreicher was assisting me that day in
14 training.

15 Q. And who is Bob Oestreicher?

16 A. He is a driver.

17 Q. He's not a supervisor, as far as
18 you know?

19 A. No.

20 Q. So what was the first thing you did
21 that morning before leaving?

22 A. That morning, as I do every
23 morning, I start my paperwork inside the
24 office. And I proceed outside to check my
25 truck. Visually check the truck itself, an

1 inspection. It's called a pretrip inspection.

2 And then I check my load.

3 Q. And what do you mean by checking
4 your load? What specifically did you do?

5 A. We are required to get up on the
6 back of the truck and physically and visually
7 check to make sure that every cylinder that we
8 are supposed to have for our deliveries that
9 day match what is on the truck. And physically
10 check to make sure that everything is secured
11 properly.

12 Q. Okay. And then what did you do
13 when you -- I apologize -- and were these the
14 same cylinders that were on the truck in the
15 morning, or do you not remember?

16 A. I'm not sure.

17 Q. So where did you stop with
18 Oestreicher in the vehicle with you?

19 A. The first customer we went to was
20 GE.

21 Q. Okay. And by "GE" you mean General
22 Electric?

23 A. Correct.

24 Q. Is that a large facility?

25 A. Yes, sir.

1 Q. And what did you do at GE?

2 A. At GE we had multiple stops. One
3 of them being the training stop that Mr.
4 Oestreicher was to train me on using the crane.

5 Q. And what is it that you had to lift
6 with the crane?

7 A. It was a 12-pack cradle.

8 Q. And could you explain, just very
9 briefly, what a 12-pack cradle is?

10 A. It is 12 cylinders that are
11 manifolded. And preassembled, bolted together
12 in a cage.

13 Q. Are you responsible for securing
14 cylinders within that cradle?

15 A. No.

16 Q. Okay. And what happened on your
17 way -- what did you do next?

18 A. After we did the crane stop I had
19 two other stops inside there that I had made
20 deliveries to.

21 Q. And did you do any safety checks
22 before getting back on the road?

23 A. Yes.

24 Q. Okay. Did that include making sure
25 that your cylinders were all --

1 JUDGE DAWSON: Okay, you need to
2 ask him questions. You're leading the witness.
3 And this is your witness. Ask open-ended
4 questions.

5 MR. BRINKER: I apologize.

6 Q. What did those safety inspections
7 include?

8 A. I have a routine that anytime I
9 want to go back in that truck I visually and
10 physically check every pallet.

11 Q. Then what did you do next after
12 that?

13 A. After we were finished at GE I was
14 to take Bob Oestreicher back to the plant.

15 Q. Okay. And what did you do?

16 A. As we returned to the plant, we
17 have gates that are secured, limited access.
18 And I pulled into the driveway where Mr.
19 Froslear was standing at his car. And I
20 stopped at the gate to get out and open the
21 gate.

22 Q. Okay. Then what happened?

23 A. After I opened the gate I got back
24 in the truck and proceeded to pull forward. As
25 I was pulling forward, the gate, from the wind,

1 was starting to blow back towards the truck. I
2 abruptly hit the brakes to stop the truck from
3 proceeding any further, to limit damage if the
4 gate hit the truck.

5 Where I was at -- as I was pulling
6 through the gate, the gate had actually lined
7 up with the driver's side door. And the gate
8 was actually closing up through the truck that
9 I was able to reach outside the window and push
10 the gate back open.

11 Q. When you stopped the truck, how
12 hard did you apply your brakes?

13 A. It was hard enough that, I mean we
14 moved in the seat. It was an abrupt stop.

15 Q. And then what did you do, after
16 that, what did you do?

17 A. After I pushed the gate back open,
18 I pulled in the yard of our plant. And parked
19 over close to the building for myself and
20 Oestreicher to get out.

21 Q. Did you chock the tires?

22 A. No, I did not.

23 Q. Why?

24 A. Airgas' policy for chocking wheels
25 and codes are during unloading or loading

1 process. Per Mark MacBride who rode with me
2 this past November. We actually stopped to
3 take a break and go over my review. And when
4 we had stopped, I proceeded to put the cones
5 and wheel chocks out.

6 And Mr. MacBride's advice to me
7 was, after we sat down inside, "I was not
8 trying to be rude and not help you. But you
9 did not have to put those out."

10 Q. So you got out of the vehicle.
11 What was the next thing that happened?

12 A. Well, after I got out of the
13 vehicle, as I generally do if I come back in
14 midday, I go inside to check my mailbox and
15 generally use the restroom any time I have a
16 break.

17 Q. And what's the next thing that
18 happened in the story here?

19 A. As I had went inside I had actually
20 at one point made eye contact with Clyde
21 Froslear, who was inside the office area as I
22 was in the break area, by our mailboxes. As I
23 was standing there, he appeared to look out as
24 if he was looking for somebody. Nothing was
25 said. He looked, turned and walked away.

1 Q. Did he see you?

2 A. Yes. We made eye contact.

3 JUDGE DAWSON: Where was he and
4 where were you when you made eye contact?

5 THE WITNESS: There is a door
6 between our lobby, if you want to call it, and
7 our office. Where our receptionist sits
8 leading back to management's office. And he
9 was standing in that area close to the door.
10 We were probably within 20 feet from each
11 other.

12 JUDGE DAWSON: And where were you?

13 THE WITNESS: I was standing in by
14 the mailboxes.

15 JUDGE DAWSON: That was before you
16 went to -- did you go to the breakroom or you
17 went to the restroom?

18 THE WITNESS: The restroom was
19 after the fact.

20 JUDGE DAWSON: Okay. Go on Mr.
21 Brinker.

22 Q. And then what happened after that?

23 A. Shortly after that, I went to use
24 the restroom before leaving. And as I
25 proceeded out to my truck, I noticed Clyde

1 Froslear standing down the passenger side of
2 the truck, which would be the opposite side to
3 this picture, taking a picture with his phone
4 held up to the truck.

5 Q. Okay. Did you see each other?

6 A. Yes -- at that point, no.

7 Q. And then what happened after you
8 saw him?

9 A. After that I proceeded around the
10 driver's side of the truck to go investigate
11 what he was looking at.

12 Q. Okay. How far were you from him at
13 this point?

14 A. Upon approaching the back side of
15 the truck, he was -- I was on the driver's
16 side. He was approximately on the passenger
17 side I would say, 10, 15 feet, the width of the
18 truck.

19 Q. And did you see each other then?

20 A. Yes.

21 Q. Did you make eye contact?

22 A. Yes.

23 Q. And then what happened next?

24 A. After that, nothing was said. So I
25 got up on the back of the truck.

1 Q. And when you say "nothing was
2 said," what do you mean by that?

3 A. As I -- the controls for that lift
4 gate are on the passenger side rear,
5 approximately where Mr. Froslear was standing.
6 And so I walked to that side to lower the lift
7 gate so I could go up on the back of the truck
8 and investigate what he was taking pictures of.

9 Q. And when you say "nothing was
10 said," what do you mean by nothing was said?

11 A. As I walked around the back of the
12 truck to the controls, he walked in the
13 building.

14 Q. So Mr. Froslear didn't say anything
15 to you?

16 A. No.

17 Q. And you didn't say anything to him?

18 A. No.

19 JUDGE DAWSON: You walked to the
20 back of the truck to do what?

21 THE WITNESS: I seen him taking
22 pictures.

23 JUDGE DAWSON: Right.

24 THE WITNESS: So I walked back to
25 see what he was taking that picture of, to see

1 if he would say something to what the problem
2 was. Because he's not every day out taking
3 pictures at the back of trucks.

4 Q. So after you looked at the back of
5 the truck, what did you do?

6 A. After I looked at the back of the
7 truck I readjusted the cylinders and the
8 straps. And checked everything else on my
9 truck and proceeded to leave for the rest of my
10 route.

11 Q. And how did you adjust the
12 cylinders? What did you do?

13 A. I resituated the cylinders in a
14 better position with two straps on them. And
15 they were secured, not moving, as they were
16 when I undid the straps.

17 Q. Could you be more specific with
18 where you moved and how you moved the
19 cylinders?

20 A. No, I cannot.

21 Q. So you just don't remember?

22 A. To say how I absolutely put them,
23 no.

24 Q. But you straightened them up?

25 A. I did straighten them up. I do

1 remember --

2 MR. MURPHY: Objection, that's
3 leading. And he's already testified about it.

4 JUDGE DAWSON: I'm sorry. What was
5 the question?

6 MR. BRINKER: I said, "Did you
7 straighten the cylinders?"

8 JUDGE DAWSON: Okay. I'm going
9 overrule that. Because, as you said, he's
10 already answered the question. So it wouldn't
11 be necessarily leading if he already answered
12 the question.

13 MR. MURPHY: It's leading because
14 he answered it more comprehensively, and now
15 counsel's trying to narrow his answer by
16 re-asking the question in a different way.

17 JUDGE DAWSON: Okay. Then I'll go
18 back and reverse. I will sustain that. And
19 you can ask open ended questions.

20 MR. BRINKER: Okay.

21 Q. After you readjusted the straps,
22 what did you do in the back of the truck?

23 A. I checked the rest of the load, as
24 I would do any time that I am on the back of
25 the truck.

1 JUDGE DAWSON: What was the rest of
2 the load?

3 THE WITNESS: Well, it was other
4 cylinders. As you can see in the corner of the
5 picture, here, was propane cylinders that I
6 had.

7 JUDGE DAWSON: No. I only see the
8 cylinders that were based on previous
9 testimony, had shifted and that you
10 straightened.

11 A. There are, as you can see, right on
12 the very left side an aluminum Propane 33
13 cylinder.

14 JUDGE DAWSON: Okay. That looks
15 like it's outside the trailer, or outside of
16 something. Is that on the truck too?

17 THE WITNESS: That is on the truck.
18 The picture is taken from outside the trailer.

19 JUDGE DAWSON: Okay.

20 Q. So is that a separate pallet?

21 A. Yes, sir.

22 Q. And so these, the hydrogen
23 cylinders that you were referring to, what were
24 they in?

25 A. The propane cylinders were in a

1 metal rack that holds those cylinders.

2 Q. Is that a 12-pack cradle?

3 A. No.

4 Q. Was there a 12-pack cradle on the
5 truck?

6 A. Yes, there was.

7 Q. And what was that?

8 A. There was multiple cradles from the
9 GE stops, which were air cradles. Which was
10 the crane stop that I was trained on. And then
11 the other cradle that was on the truck was, I
12 believe it's hydrogen, I believe UPC that is
13 specific to a GE customer.

14 Q. Okay. What was the next time you
15 the saw Froslear?

16 A. I believe the next time I saw
17 Froslear would have been later that week in the
18 grievance meeting.

19 Q. And I apologize, I skipped a
20 question. After you checked these cylinders
21 and got back down, did you continue on with the
22 rest of your day? What happened next?

23 A. Yes, I got back in the truck. Left
24 the yard. And finished my route for that day.

25 Q. Okay. Could you tell us about the

1 August 5th meeting that you had over your
2 grievances?

3 A. The August 5th meeting was, I
4 believe pertaining to the three-day suspension
5 that I had served in July for working off the
6 clock.

7 Q. And did Froslear say anything to
8 you at that meeting to you about progressive
9 discipline?

10 A. No.

11 Q. And did he say anything to you
12 about the loose leaning cylinders?

13 A. No.

14 Q. Did he mention the word unsecured
15 load?

16 A. No.

17 Q. Could you please tell us about the
18 August 6th meeting where you received your
19 written warning?

20 A. The August 6th meeting was the next
21 morning. Generally, Barry Perkins had left a
22 note to stick around for any write up.

23 Q. And who is Barry Perkins?

24 A. He is our union steward.

25 Q. And so who all was in attendance at

1 the meeting?

2 A. I believe myself, Barry Perkins,
3 Clyde Froslear, and I think Dave Luehrmann.

4 Q. And when did Froslear first tell
5 you about the leaning cylinders?

6 A. This meeting.

7 Q. And when did he first use the term
8 "unsecured load"?

9 A. Generally, when we go into that
10 meeting, he will hand the write up. And this
11 is what we're talking about. And I'm sure it
12 was used after that once I objected to it.

13 Q. Let's move on to this write up. I
14 believe it's Joint Exhibit 1. You should have
15 that up there. If you could just review that
16 first paragraph there, what was your response
17 or -- first of all, what was your reaction
18 after you first read that, that paragraph?

19 A. My response was I was shocked that
20 I was being written up for this. Because I had
21 addressed the issue and fixed it before leaving
22 the yard.

23 Q. And what was your reaction to the
24 statement, "He saw that you had a pallet on
25 your truck that was not properly strapped which

1 was causing the noise"?

2 A. My argument was that these
3 cylinders, though leaning, as I was told, not
4 shown, were not making the noise.

5 Q. And your reaction, what you said
6 was that those cylinders were not making the
7 noise?

8 A. Correct.

9 Q. And how did you know that?

10 A. When I got up there to re-strap
11 those cylinders they were not loose enough to
12 be making noise. As you can see in that
13 picture, they are completely touching. You
14 can't see no air between those, no light, I
15 should say between those cylinders.

16 If those cylinders, in my opinion,
17 were making a noise you would see gaps in
18 there. Because that's two things hitting
19 together and making noise.

20 Q. Is this, in your opinion, something
21 that happens from time to time?

22 A. Yes.

23 Q. And what have you been trained to
24 do when you notice that this kind of thing
25 happens?

1 A. We were trained if you find this,
2 you hear it, you fix it. So you don't have
3 anything making noise.

4 Q. Okay. And what did you do after
5 this -- I'm sorry. I skipped ahead. What else
6 did you say at this meeting?

7 A. In this meeting my argument was the
8 item that was making the noise on the back of
9 my truck was a hydrogen 12-pack.

10 Q. And what was Mr. Froslear's
11 response to that?

12 A. His response to that was he more or
13 less didn't care about that. His concern was
14 the leaning cylinders.

15 Q. And what did you do -- did you
16 request to see the pictures?

17 A. Yes, I did.

18 Q. And what was Froslear's response?

19 A. No, I'm not going to show you.

20 Q. Did he ever show you the pictures?

21 A. I think at a later meeting. But
22 not at that one.

23 Q. After this meeting, what did you do
24 next?

25 A. After this meeting, myself and

1 Barry Perkins, as usual after a meeting, we
2 proceeded to the lobby and discussed what was
3 talked about in the meeting. And at that time
4 myself and Perkins discussed him going back in
5 there and requesting that it be a verbal.

6 Because --

7 Q. What do you mean by "verbal"?

8 A. A verbal warning. I asked him to
9 go in and request if it could be, potentially
10 be a verbal. Because this was my first
11 instance with -- accused of rattling cylinders.

12 Q. And did you do any documentation
13 yourself of the truck after this or the
14 cylinders?

15 A. I've generally been taking notes as
16 far as meetings and things like that.

17 Q. Did you take any pictures or videos
18 yourself?

19 A. Yes, actually. I did take a video
20 because one of the arguments was that the
21 object that was making noise was a hydrogen UPC
22 12-pack that I had picked up that Monday at GE.
23 It was scheduled to be shipped out to the plant
24 that fills it that Thursday of the meeting.
25 That morning. I knew it was on the back of

1 that truck, getting ready to leave. And that's
2 why I requested that Mr. Froslear investigate
3 it further and see that this cradle was the
4 object making the noise that he heard.

5 Q. Okay.

6 A. So when I asked Barry Perkins to go
7 back in and request the -- that it be a verbal,
8 at that point I had went outside. And actually
9 taking a video on my phone of the hydrogen
10 cradle with the obviously loose cylinder in it.

11 Q. And did you provide that video to
12 me?

13 A. Yes, sir.

14 Q. What I'm going to do now is show
15 you the video. And then I'm going to ask you
16 questions about it afterwards so you can verify
17 --

18 JUDGE DAWSON: I just want a
19 clarification. You mentioned that you wanted
20 Mr. Froslear to go and look at this 12-pack
21 cradle?

22 THE WITNESS: Yes.

23 JUDGE DAWSON: Did you or Mr.
24 Perkins make that request on August the 6th?

25 THE WITNESS: I myself did.

1 JUDGE DAWSON: When you were in the
2 meeting, before you left and took the video?

3 THE WITNESS: Yes.

4 JUDGE DAWSON: Okay.

5 Q. So I'm going to play this video now
6 and ask you questions later about its
7 authenticity afterwards.

8 (Video playback.)

9 - - - - -

10 (Thereupon, General Counsel Exhibit
11 5, CD with Video Recording, was
12 marked for purposes of
13 identification.)

14 - - - - -

15 Q. Okay. So that video -- which I
16 actually have two copies of here, that I will
17 mark General Counsel's Exhibit 5. The video
18 that you just watched, is that the same video
19 that your recorded?

20 A. Yes.

21 Q. And approximately what time did you
22 take that video?

23 A. I would say it would have been
24 after 7. Between 7 and 8 in the morning.

25 Q. Okay. And what date?

1 A. August 6th, I believe.

2 Q. Okay. And is that the same -- is
3 that the same cylinder that's on --

4 JUDGE DAWSON: And we're talking
5 about 2015, just for the record. Go on.
6 Correct?

7 MR. BRINKER: Yeah, 2015. Did I?

8 JUDGE DAWSON: You didn't say any
9 year. I'm just clarifying that for the record.

10 Q. So that video that you took is no
11 different -- the video that you just saw is no
12 different than the video you took on that date?

13 A. Yes.

14 MR. BRINKER: That's all the
15 questions I have at this time.

16 JUDGE DAWSON: Do you want to admit
17 the video?

18 MR. BRINKER: Yes, your Honor. I'd
19 like to move to admit the video into evidence.

20 MR. MURPHY: Voir dire, your Honor?

21 JUDGE DAWSON: Yes, you may.

22 VOIR DIRE EXAMINATION

23 BY MR. MURPHY:

24 Q. Does the video show you braking?

25 A. Me braking?

1 Q. Yeah. Did the video show the truck
2 braking?

3 A. No.

4 Q. Does the video show the truck
5 coming to an abrupt stop?

6 A. No. That video is on another
7 driver's truck that left that morning.

8 Q. The video we just saw was on
9 another driver's truck that left that morning?

10 A. Correct.

11 Q. I don't understand that statement.
12 Could you please explain?

13 A. When we were in the write up
14 meeting, and I was informed that Mr. Froslear
15 witnessed me pulling in the yard and he heard
16 noise. When he said he heard noise, and I got
17 up on the truck after that -- to fix those
18 cylinders, those cylinders that I fixed were
19 not loose enough to be rattling. They did
20 shift. There's no denying that. They did
21 shift. I did correct those.

22 Throughout that day it became
23 relevant to me and it became relevant once this
24 meeting had occurred that what was rattling on
25 the truck was that cradle, which I had no way

1 of controlling.

2 Q. So I thought your testimony before
3 -- your testimony before was that it was the
4 sudden braking that caused the rattling; is
5 that correct? The fact that you had to come to
6 a sudden stop?

7 A. Yes. That would have caused that
8 to rattle.

9 Q. And so in the video you're showing
10 your hand shaking a cylinder, correct?

11 A. Correct.

12 Q. But you're not showing the truck --
13 you're not showing what sounds that cylinder
14 would have made had the truck stopped,
15 abruptly?

16 A. My simulation of my hand moving the
17 cylinder would, in my opinion, serve as that
18 truck coming to an abrupt stop, which would
19 shake the truck and trailer.

20 Q. Okay.

21 MR. MURPHY: I'm not sure it's
22 relevant anyway. But I object to -- sorry.

23 JUDGE DAWSON: I'm sorry. Go on,
24 you finish.

25 MR. MURPHY: I'm not sure it's

1 relevant anyway. But I object to admission of
2 the video as an extremely unscientific
3 recreation of what a cylinder would sound like
4 -- what that particular cylinder would sound
5 like in a braking situation.

6 Also there's authenticity problems
7 with the cylinders on a different date.
8 There's no evidence that it's the same
9 cylinders. There's no evidence that they are
10 load into the 12-pack the same way. I just,
11 for multiples reasons, object to admission of
12 the video. I don't think it's relevant or
13 helpful at all.

14 MR. BRINKER: Your Honor, if I can
15 respond. I think it goes to -- that all goes
16 to the weight of the evidence, one. But at the
17 very least it shows that it is possible that
18 these cylinders, which are not the
19 responsibility of the driver, they can rattle
20 and make noise. And there was no investigation
21 done into what was actually making the noise.
22 There was just a conclusion that it was these
23 other cylinders. Not this 12-pack.

24 MR. MURPHY: And furthermore,
25 there's no way to know that the 12-pack or the

1 cylinders weren't modified or tampered with in
2 some way between the time of the incident and
3 the time the video was shot.

4 JUDGE DAWSON: Okay. I'm going to
5 reserve my ruling on this. I'm going to think
6 about it.

7 Mr. Rottinghouse, the cylinders
8 that you videoed[sic], where did they come
9 from, the 12-pack.

10 THE WITNESS: That 12-pack is
11 generally filled in Lansing, Michigan. It is
12 therefore transported on a truck to our
13 location. After our location, we deliver it to
14 the customer. That customer being General
15 Electric, GE. Every stop that we do inside of
16 GE --

17 JUDGE DAWSON: Okay. So why was a
18 12-pack cylinder on your truck on August the
19 3rd?

20 THE WITNESS: That was a 12-pack
21 that I had picked up that morning from GE.

22 JUDGE DAWSON: From GE?

23 THE WITNESS: Yes. Which is
24 traceable by that serial number that I
25 recorded. Because every stop at GE, we record

1 the serial numbers of the cylinders --

2 JUDGE DAWSON: Is that the same
3 cylinder that you took the video of?

4 THE WITNESS: Yes. Because I
5 picked that up on Monday. And it doesn't get
6 shipped out until Thursday.

7 JUDGE DAWSON: Okay. And where is
8 it getting shipped to?

9 THE WITNESS: It goes to Lansing,
10 Michigan.

11 JUDGE DAWSON: Okay. From GE to
12 Lansing, Michigan?

13 THE WITNESS: It goes from GE, on
14 our truck, back to our plant. And then from
15 our plant to Lansing, Michigan.

16 JUDGE DAWSON: So what happens to
17 the cylinder at your plant in the interim
18 between August the 3rd and August the 6th?

19 THE WITNESS: At the end of the day
20 that cradle is offloaded and put in a bunker
21 with the rest of all the pallets that they
22 accumulate to go back that week.

23 JUDGE DAWSON: And how do you know
24 then that that was the same 12-pack that you
25 brought in on the 3rd.

1 THE WITNESS: To my knowledge, the
2 only customer that we have that takes a UPC
3 hydrogen cradle is GE. And it can be traced,
4 like I said, by that serial number.

5 JUDGE DAWSON: Did you trace the
6 serial number to see if that was the same one?

7 THE WITNESS: I did not.

8 JUDGE DAWSON: Okay. So you don't
9 know if it was the same one?

10 THE WITNESS: I am fairly certain
11 that it was the same cradle. Like I said, our
12 empty stock is transferred every Thursday, when
13 we --

14 JUDGE DAWSON: And that would've
15 been the only 12-pack that would've been in
16 stock to transport on Thursday?

17 THE WITNESS: As far as empties, I
18 would say yes.

19 JUDGE DAWSON: So they were empty
20 when you brought them to -- the cradle, the
21 12-pack, the cylinders were empty when you
22 brought them back to your facility?

23 THE WITNESS: Yes, ma'am.

24 JUDGE DAWSON: And are they taken
25 to Lansing to be refilled or are they refilled

1 at your facility?

2 THE WITNESS: They are refilled in
3 Lansing.

4 JUDGE DAWSON: I don't have any
5 other questions.

6 MR. MURPHY: Additional voir dire?

7 JUDGE DAWSON: Go on.

8 Q. Between the 3rd, when you drove
9 back on the property, and when you shot this
10 video on the 6th -- was it the 6th?

11 A. Yes. Morning of.

12 Q. Okay. Between the 3rd and the 6th.
13 And assuming it's the same cage with the same
14 12 cylinders in it, was that cage and those
15 cylinders in your possession the entire time,
16 from the 3rd to the 6th?

17 A. No. They were in Airgas'
18 possession.

19 Q. Is it not conceivable that at some
20 point a cylinder came lose or a rubber object
21 that was holding a cylinder in place so it
22 didn't rattle came out during that time? Is it
23 not possible?

24 A. It is possible.

25 MR. MURPHY: I maintain my

1 objection, your Honor.

2 JUDGE DAWSON: And again, I will
3 reserve my ruling on this. I mean, if I do
4 admit it into evidence it will -- I don't know.
5 I will give it whatever weight I feel it
6 deserves. But right now I'm not going rule on
7 it. Because we don't have a clear chain of
8 possession of these things. Go on.

9 MR. BRINKER: That was the last
10 thing that I had, your Honor.

11 JUDGE DAWSON: Let's see. Cross
12 examine?

13 MR. MURPHY: Off the record,
14 please?

15 JUDGE DAWSON: Okay. Off the
16 record.

17 (Off the record.)

18 JUDGE DAWSON: Back on the record.

19 MR. MURPHY: I'd like to make a
20 Jenks request to the Counsel for the General
21 Counsel for any written statements this witness
22 has given as part of the investigation.

23 JUDGE DAWSON: Yes. Other than the
24 one that you already have -- no, you don't have
25 that. That was Mr. Froslear. Yes, definitely.

1 And we're going to go off the record so that
2 Mr. Murphy will have an opportunity to look at
3 any Jenks statements or affidavits.

4 We can go off the record.

5 (Off the record.)

6 JUDGE DAWSON: Okay. Back on the
7 record. And do you have questions?

8 MR. MURPHY: Just one or two, your
9 Honor.

10 CROSS EXAMINATION OF STEVEN WAYNE ROTTINGHOUSE,
11 JR.

12 BY MR. MURPHY:

13 Q. Mr. Rottinghouse, during the August
14 6th, 2015 grievance meeting about this
15 incident, you previously testified under direct
16 that Clyde stated the basis for the discipline
17 was the rattling he heard. Is it not true that
18 he also stated that the basis for the
19 discipline was the fact that the cylinders
20 moved and were tilted?

21 A. I don't know if he said that.

22 Q. Okay. I'm referring to your
23 affidavit that you gave to the Board.

24 MR. MURPHY: Permission to
25 approach, your Honor, so I can hand the witness

1 a document?

2 JUDGE DAWSON: Yes.

3 Q. This is your affidavit in this
4 case, delivered on 8/27/15. And I'm looking at
5 page 3. And line 16, beginning with "Froslear
6 said." Can you just read that?

7 A. Sure. "Froslear said we did not
8 need to do that. This is about the cylinders
9 that were leaning. I asked why I was being
10 written up for this. And Froslear said he had
11 talked to the driver trainer and cylinders were
12 unsecured, and this was the employer's stance
13 on it.

14 MR. MURPHY: Okay. Thank you.
15 Nothing further. Your Honor.

16 JUDGE DAWSON: Okay.

17 MR. BRINKER: I just have a couple
18 quick questions.

19 REDIRECT EXAMINATION OF STEVEN WAYNE

20 ROTTINGHOUSE, JR.

21 BY MR. BRINKER:

22 Q. If you look on Joint Exhibit 1,
23 written warning, in your own words, what is he
24 talking about in the first paragraph?

25 A. In the first paragraph he states

1 that when he was in the parking lot he heard
2 rattling and saw you pulling to the yard. The
3 way I take that, he heard something rattling on
4 the truck.

5 JUDGE DAWSON: Right. But it also
6 says when he went to investigate the noise he
7 saw that you had a pallet on your truck that
8 was not properly strapped. Is that -- which
9 was causing the noise. Is that not also in the
10 first paragraph.

11 THE WITNESS: Correct. But what it
12 says following that --

13 JUDGE DAWSON: I didn't ask you
14 anything else. You may proceed, Mr. Brinker.

15 Q. What does it say after that? What
16 were you going to say?

17 A. It was stating that which was
18 causing the noise. Which was my objection.

19 JUDGE DAWSON: Yeah. But it's also
20 clear here, based on the evidence that has been
21 admitted, that this is also about unsecured
22 cylinders. Not just about rattling, okay? And
23 I understand that they can be related. But
24 there's also -- I mean --

25 Q. Did Mr. Froslear say anything --

1 I'll withdraw the question.

2 MR. BRINKER: That's all I have,
3 your Honor.

4 JUDGE DAWSON: All right. And I
5 understand the evidence also shows that Mr.
6 Froslear didn't investigate to see what -- when
7 I say "investigate" did not ask Mr.
8 Rottinghouse questions on the day of the
9 incident. I don't know why. But anyway, are
10 there any other questions for this witness?

11 MR. BRINKER: No, your Honor. I
12 don't have any.

13 MR. MURPHY: None, your Honor.

14 JUDGE DAWSON: Okay. Mr.
15 Rottinghouse, I'm going to direct that you not
16 discuss your testimony or the questions asked
17 with anyone. You may be excused.

18 THE WITNESS: Thank you.

19 JUDGE DAWSON: And we're going to
20 go off the record.

21 (Off the record.)

22 JUDGE DAWSON: We can go back on
23 the record. And we have our next witness on
24 behalf of the Charging Party, who was called by
25 the General Counsel. And, sir, state your

1 name, please? And if you would spell your full
2 name.

3 THE WITNESS: Robert Oestreicher.
4 O-E-S-T-R-E-I-C-H-E-R.

5 JUDGE DAWSON: Okay. And sir,
6 would you raise your right hand, please?
7 (Whereupon,

8 ROBERT OESTREICHER
9 Was called as a witness by and on behalf of the
10 Charging Party and, after having been duly
11 sworn, was examined and testified as follows:)

12 JUDGE DAWSON: Thank you, sir. You
13 may lower your hand. And Mr. Brinker will ask
14 you questions, next.

15 MR. BRINKER: Yes.

16 Q. Mr. Oestreicher, what do you do for
17 a living?

18 A. Truck driver at Airgas.

19 Q. And at work, do you supervise
20 anyone else?

21 A. No.

22 Q. What is your involvement with
23 Teamsters Local 100? Are you a member?

24 A. Yes.

25 Q. What offices have you held with the

1 union?

2 A. None.

3 Q. None. Okay. Could you walk us
4 through the events of August 3rd the best that
5 you can remember them?

6 A. Okay.

7 Q. August 3rd, 2015.

8 A. You mean, like -- I was -- I came
9 in that day to -- I was going to ride with
10 Steve. I'm a crane operator, the only crane
11 operator we had at the time. I was going to
12 ride with Steve to train him on the crane
13 truck. So we came in and started our day. And
14 we went to a customer.

15 And upon our return to the
16 facility, we pulled into the parking lot.
17 Stopped at the gate. Steve got out of the
18 truck. Opened the gate. We started to go
19 through the gate.

20 As we started to move the truck, I
21 yelled that the gate was closing. Steve
22 stepped on his brakes real hard. Stopped the
23 truck. He reopened the gate. We went through
24 the gate. Went into the parking lot to park.

25 I got out of the truck. Went into

1 the plant at that time. I was sitting at the
2 table there. And a few minutes later, Steve
3 had come in and stated that Clyde was out there
4 taking pictures of his truck.

5 Q. I'm sorry. Mr. Rottinghouse,
6 Steve?

7 A. Yes. Came in and we got to
8 talking. He said Clyde was taking pictures of
9 his truck. And I asked him what for. And he
10 said there's some leaning bottles on the truck
11 at that time. And I had mentioned that you'll
12 probably get a write up. I think that's -- I
13 mean --

14 Q. Okay. So to back up, when you were
15 at GE, did you get out of the vehicle with him?

16 A. Yes.

17 Q. And did you participate in loading
18 the cylinders with him?

19 A. I mainly was instructing, kind of
20 working with him with the crane.

21 Q. Did you see him secure the
22 cylinders?

23 A. The particular cylinders that we
24 lifted at GE were 12-packs. Using the crane,
25 we didn't really move the cylinders.

1 Q. Okay. Did you look into the back
2 of the truck at all during the day?

3 A. I was up and down on the truck,
4 through that stop.

5 Q. Did you notice anything wrong?

6 A. No.

7 Q. Were you the one who saw Froslear
8 taking pictures?

9 A. No.

10 Q. Did you see Froslear at all that
11 day?

12 A. When we pulled into the parking
13 lot, he was standing at his car.

14 Q. Okay. And did you see him after
15 that at all?

16 A. No.

17 Q. Okay. How long have you been
18 working for the Employer?

19 A. 31 years.

20 Q. And have you been a driver that
21 whole time?

22 A. Yes.

23 Q. Okay. In your experience, is it
24 possible for straps to work their way up or
25 down a cylinder during transportation?

1 A. Yes.

2 Q. And is this something that happens
3 in the normal routine?

4 A. Yes.

5 Q. Could you tell me what standard
6 practice is, involving cylinders where the
7 straps move?

8 A. If they happen to move while you're
9 in transportation from stop to stop you would
10 notice this when you reached your next stop.
11 And you would re-secure them, tighten them up,
12 make sure everything's good at that time.

13 Q. Is it -- what has the Employer told
14 you about major versus minor DOT violations?

15 A. I don't understand what you mean to
16 answer that.

17 Q. Have they told you anything about
18 major versus minor DOT violations?

19 A. No.

20 Q. Have you ever heard that term
21 before?

22 A. No.

23 Q. What, in your experience, is a
24 driver's responsibility for the 12-pack
25 cradles?

1 A. Just make sure it's secure on your
2 truck.

3 Q. The actual cradle itself?

4 A. Yes.

5 Q. Do they have any actual
6 responsibility inside of the cradle?

7 A. No.

8 Q. What are you taught to do when you
9 hear rattling in a 12-pack cradle?

10 A. There's really nothing you can do
11 while you're out on your route.

12 Q. Is it -- the cylinders you see
13 here, did you see these cylinders here earlier
14 today?

15 A. That day?

16 Q. That day.

17 A. Yes. On the truck?

18 Q. Correct.

19 A. I seen the cylinders on the truck
20 that day.

21 Q. And when you saw them --

22 JUDGE DAWSON: Now, this is not a
23 12-pack, correct?

24 THE WITNESS: No.

25 Q. Now, from what you see here, what

1 is wrong with this picture?

2 A. They look tight. I don't think
3 anything is wrong with those.

4 Q. And the fact that they are leaning,
5 does that mean they are unsecured?

6 A. No.

7 Q. What makes you say that? Could you
8 explain that a little bit?

9 A. Within a pallet that's designed for
10 so many cylinders, if you have fewer cylinders,
11 they are going to lean regardless how tight
12 they are. They're tight and secure. They're
13 not going anywhere. But they can lean left and
14 right.

15 Q. And could you explain why it might
16 be possible that these were leaning and were
17 not secure, specifically to this picture?

18 A. Say that again?

19 Q. When you look at this picture, what
20 tells you that these are still secure?

21 A. They're not falling over. They're
22 not criss-crossed. They're not anything but
23 standing upright and secure.

24 Q. And if you pulled into a parking
25 lot, what would you do with these cylinders?

1 A. In that event, probably nothing.

2 Q. In your experience as a driver,
3 have you seen cylinders lean before?

4 A. Yes.

5 Q. Have you ever seen an employee
6 disciplined for cylinders that leaned?

7 A. No. I don't think anybody's ever
8 been written up for leaning cylinders. I don't
9 know.

10 Q. And I may have asked this before.
11 But what is the standard practice when a
12 cylinder will lean?

13 A. I mean, if it looks out of place,
14 you would re-secure it. But if the bottle is
15 typically leaning a little bit, nothing.

16 MR. BRINKER: Okay. I think that's
17 all the questions that I have.

18 JUDGE DAWSON: Okay. Cross?

19 MR. MURPHY: Yes, your Honor. Just
20 a few.

21 CROSS EXAMINATION OF ROB OESTREICHER

22 BY MR. MURPHY:

23 Q. What is nesting?

24 A. Nesting is a formation of the
25 bottles.

1 Q. Explain the formation, please?

2 A. If you have seven bottles you could
3 either put like five bottles in the back or two
4 in front or four in the back and three in the
5 front.

6 Q. Okay. Thank you. Is getting into
7 an accident more serious than clocking in a
8 minute early?

9 A. Yes.

10 Q. Okay. So even though they are both
11 DOT violations, potentially, you can tell one's
12 more serious than the other?

13 A. Yes.

14 Q. And would it surprise you to learn
15 that no one who's gotten into an accident has
16 received, for a first incident of an accident,
17 no one has ever received less than a written
18 warning for their first incident of having an
19 accident? Would it surprise to learn that?

20 A. I don't know.

21 Q. That every time someone's got into
22 an accident it's been a written warning or
23 higher?

24 JUDGE DAWSON: What are you talking
25 about when you're talking about an accident?

1 MR. MURPHY: A vehicle accident.

2 A. Say again?

3 JUDGE DAWSON: Okay. Go on.

4 A. I'm not sure I'm -- I don't --

5 Q. If you get into an accident, what
6 level of discipline would you expect to get?

7 A. I would think a verbal warning.

8 Q. You would think a verbal warning?

9 A. Yes. First offense.

10 Q. And then, if you clocked in a
11 minute early and you were out of service
12 because you clocked in a minute early, what
13 level of discipline?

14 A. Verbal warning.

15 Q. And is a verbal warning called --
16 part of the progressive discipline as defined
17 in the collective bargaining agreement?

18 A. I would say yes. I'm not sure.

19 Q. You're not sure. Okay. And then,
20 you said -- this is just for clarification
21 purposes. But you said you've worked for
22 Airgas for 31 years. Have you worked for
23 Airgas for 31 years or have you worked at
24 Dayton Road for 31 years?

25 A. I guess I would have to say

1 neither. We weren't at that location for 31
2 years. And it wasn't Airgas for 31 years.

3 Q. Okay.

4 JUDGE DAWSON: How long have you
5 work for Airgas?

6 THE WITNESS: Actual name Airgas?
7 Does Airgas count, of the companies they bought
8 out and became Airgas?

9 JUDGE DAWSON: How long have you --

10 THE WITNESS: I've been with the
11 same company 31 years. But it's been Airgas
12 for I guess the last eight years.

13 Q. So how long have you been at Dayton
14 Road?

15 A. I guess we built that when we
16 became Airgas, eight years.

17 JUDGE DAWSON: That's still a lot
18 of experience in my book.

19 Q. Thank you. Are you married?

20 A. Yes.

21 Q. To whom are you married?

22 A. My wife, Tammy.

23 Q. And what is you're wife, Tammy's
24 relationship to the Charging Party?

25 A. That would be his mother.

1 MR. MURPHY: Okay. Nothing
2 further.

3 JUDGE DAWSON: Okay. Do you have
4 anything else Mr. Brinker?

5 REDIRECT EXAMINATION OF ROB OESTREICHER

6 BY MR. BRINKER:

7 Q. Are there any supplies on your
8 truck to fix a 12-pack cradle?

9 A. No.

10 Q. Is it the responsibility of the
11 driver to fix 12-pack cradle?

12 A. No.

13 MR. BRINKER: Those are the only
14 questions I have.

15 JUDGE DAWSON: Are there any other
16 questions for this witness?

17 MR. MURPHY: No, your Honor.

18 JUDGE DAWSON: Okay. Sir, I'm
19 going to direct that you not discuss your
20 testimony or the questions asked of you with
21 anyone. You may be excused. Thank you, sir.

22 Off the record.

23 (Off the record.)

24 JUDGE DAWSON: Okay, we're going to
25 go back on the record. And we have our next

1 witness here. And good afternoon, sir. Would
2 you state your for the record and spell it
3 please.

4 THE WITNESS: Barry Perkins.
5 B-A-R-R-Y, P-E-R-K-I-N-S.

6 JUDGE DAWSON: Please raise your
7 right hand, sir.
8 (Whereupon,

9 BARRY PERKINS
10 Was called as a witness by and on behalf of the
11 Charging Party and, after having been duly
12 sworn, was examined and testified as follows:)

13 JUDGE DAWSON: Thank you. You may
14 lower your hand. And I'll just ask that you
15 please answer verbally and keep your voice up
16 for us. And you may proceed, sir.

17 Q. Good morning, Mr. Perkins. What is
18 it that you do for a living?

19 A. I'm a truck driver for Airgas.

20 Q. And at work, do you supervise
21 anyone else?

22 A. No.

23 Q. What is your involvement with
24 Teamsters Local 100?

25 A. I'm a union steward.

1 Q. How long have you been -- I'm
2 sorry. Let me first ask, how long have you
3 been working for Airgas?

4 A. Almost 20 years.

5 Q. And how long have you been a
6 steward?

7 A. Eight or nine years.

8 Q. Do you know how many disciplines
9 you've sat in on during that time?

10 A. In excess of 50.

11 Q. And how many other stewards are
12 there at the facility?

13 A. None at this present time.

14 Q. Could you explain what happened on
15 August 6th, regarding Rottinghouse's
16 discipline?

17 A. On the meeting?

18 Q. Yeah. Just go through the story
19 for us.

20 A. Basically we was called in that
21 morning about 7, 7:15, roughly. And there was
22 -- Clyde had stated he was writing Steve up for
23 some loose cylinders. So I asked Clyde what
24 had happened. And he said that Steve had
25 pulled up to the gate -- and I assume Clyde was

1 out in the lot. I think Clyde said he was
2 eating his lunch or eating a sandwich.

3 Had pulled up into the gate. And
4 he had heard cylinders clanging. So at that
5 point, I guess Clyde went out and took pictures
6 of the cylinders.

7 Q. And could the noise that
8 Rottinghouse[sic] heard have been made -- first
9 of all, what's a 12-pack cradle?

10 A. It's a unit of 12 cylinders in a
11 pallet. It's a permanent pallet. It's a
12 cradle that's permanently put together.

13 Q. Do drivers have any involvement
14 inside of that pallet? Do they fix it or alter
15 it or do anything with it in any way?

16 A. No. The only thing we might do is
17 turn valves off. Other than that, we don't
18 have anything to do with it.

19 Q. Is it possible that cylinders
20 inside of those 12-pack cradles would get
21 loose?

22 A. Yeah, they do. They will have some
23 movement. I know, before, I've seen them stick
24 wood in there, dry wood in between them to keep
25 them from banging around.

1 Q. And who is "they"?

2 A. Whoever is putting the banks
3 together.

4 Q. So the person assembling them. Not
5 the driver's?

6 A. Right.

7 Q. Could this noise that
8 Rottinghouse[sic] heard, from what you
9 gathered, was he able to pinpoint what the
10 cause of the noise was?

11 MR. MURPHY: Objection, leading and
12 calls for speculation.

13 JUDGE DAWSON: I'm going to sustain
14 the objection on leading.

15 Q. You mentioned that
16 Rottinghouse[sic] had heard a noise. Did he
17 indicate what that noise had come from?

18 JUDGE DAWSON: Excuse me. Do you
19 mean Mr. Froslear?

20 Q. I'm sorry. Mr. Froslear. Mr.
21 Froslear had indicated he heard a noise, to
22 you? Let me start over here. When did you
23 first find out that this -- what this
24 discipline was about?

25 A. August 6th.

1 Q. Okay. And who told you what it was
2 about?

3 A. Clyde.

4 Q. And this is before the meeting
5 started?

6 A. No. Steve and I was both called
7 in. So it was either before or after. We was
8 called into the meeting.

9 Q. And what did Froslear tell you
10 about -- he had seen?

11 A. Said he heard banging cylinders.
12 And then he went out and took pictures of some
13 cylinders leaning.

14 Q. Did he indicate that he did
15 anything else to investigate the noise?

16 A. No.

17 Q. Okay. In your experience, what
18 types of things can cause noises on the back of
19 the truck?

20 A. Pallets that are not -- are bent.
21 Loose cylinders. Banging from -- pallets
22 banging together. Banks banging together. I
23 mean, the cylinders inside the banks, the
24 cradles.

25 Q. And what steps would you need to go

1 through to identify where the noise was coming
2 from?

3 A. I would have to get up on the truck
4 and inspect it.

5 Q. What do you mean by "inspect"?

6 A. Get up and make sure all the straps
7 are secure. Inspect all the banks, if I'm
8 looking for a noise. Is that what you're
9 indicating?

10 Q. I'm not trying to indicate
11 anything. Would you be able to tell just by
12 looking at it?

13 A. No.

14 Q. What would you have to do?

15 A. Unless I seen something fell over.
16 I mean, I would have to physically get up on
17 the truck and physically inspect every pallet.

18 Q. Okay.

19 JUDGE DAWSON: Excuse me, I just
20 want to clarify, when you use the term "bank"
21 B-A-N-K, are you referring to --

22 THE WITNESS: A cradle.

23 JUDGE DAWSON: The cradle. Or the
24 pack. We hear different -- cradle, pack, bag.

25 THE WITNESS: There's a lot of

1 terms for it.

2 JUDGE DAWSON: Okay. Go on. I
3 just wanted to clarify that. Go on.

4 Q. And so during this discipline
5 meeting, did the subject of progressive
6 discipline come up at all?

7 A. Being written up?

8 Q. Yeah, as far as the severity of the
9 discipline?

10 A. Yeah. He stated that Steve was
11 getting a written warning.

12 Q. Did you ask why it was a written
13 warning instead of something else?

14 A. Basically it was brought up. I
15 can't remember if Steve asked the question why
16 this wasn't a verbal or if I asked why wasn't
17 this a verbal or a written? And basically
18 Clyde's response was that it was a serious DOT
19 violation.

20 Q. What have you been taught at Airgas
21 as far as -- what have you been taught is a
22 serious violation versus a not serious
23 violation?

24 A. I can't answer that.

25 Q. Why can't you answer it?

1 A. Because I don't know what -- I
2 mean, I know what DOT violations are. But I
3 can't tell you what a serious DOT violation --
4 I mean, a backing accident, I guess, could be a
5 serious violation. Cylinders falling off the
6 truck, that could be. There's numerous things
7 that could be serious DOT violations.

8 Q. Have you ever heard of leaning
9 cylinders being referred to as a serious DOT
10 violation?

11 A. Just in Steve's case.

12 Q. And so in your experience -- you
13 said you were a driver. In your experience, is
14 it possible -- how often -- I apologize. In
15 your experience, is it possible that cylinders
16 could become loose but not secure -- I'm sorry.
17 Could shift but still be secure?

18 A. Sure.

19 Q. Could you give me an example?

20 A. Example of -- you'll have to --

21 Q. Can you give me an example of when
22 cylinders might shift but are still secure?

23 A. Well, that happens frequently. I
24 mean the straps, if you don't have those straps
25 exactly right on those cylinders the vibration,

1 going down the road, or any kind of shift, it
2 holds -- anything will drop those straps.

3 Now, the straps are still around
4 and the cylinders are still secure. But there
5 might be sway in the cylinders.

6 Q. Now, did you see these cylinders
7 before this meeting?

8 A. In the picture?

9 Q. Yes. In the picture.

10 A. No.

11 Q. Did you see this picture during the
12 meeting?

13 A. No.

14 Q. When was the first time you saw
15 this picture?

16 A. Right after Steve and I finished
17 our meeting, Clyde ended up showing me the
18 picture.

19 Q. And if you take a look at this
20 picture now, what did Mr. Rottinghouse do wrong
21 in this picture, as far as securing the
22 cylinders?

23 A. The cylinders look secure. The
24 straps go around. All I can tell you is that
25 these pallets are not designed to hold three or

1 four cylinders. They are designed to hold 14
2 cylinders, or 10 or eight. But when you start
3 getting three or four cylinders, and it's hard
4 to secure these cylinders.

5 Q. Now, obviously you don't have the
6 ability to physically check these. You're just
7 looking at it right here. But looking at it,
8 are these cylinders in danger of coming loose?

9 A. No.

10 Q. Have you ever, in your experience
11 as a steward, have you ever heard of another
12 employee being disciplined for cylinders that
13 look like this?

14 A. No. I can tell you Bill Huff was
15 written up a few years back for cylinders
16 actually coming out of the pallet. But that
17 was, they were laying in the center aisle. But
18 not on this case, no.

19 Q. And by "laying in the center
20 aisle," what do you mean there?

21 A. They had come completely out of the
22 straps, out of the pallet, and was laying in
23 the center aisle of the truck.

24 Q. Now, if we're talking serious
25 versus minor, would you say that that is at the

1 same level of seriousness as what you're seeing
2 here?

3 A. I would consider Bill Huff's
4 incident more serious. They could've fell off
5 the back of the truck. In this case, the
6 cylinders are upright. They have a little lean
7 to them. But the straps are around them and
8 they're secure.

9 Q. And if this was your truck, what
10 would you do if you pulled into the lot and you
11 noticed they looked like that?

12 A. I would straighten them. I would
13 attempt to re-strap. But that would be it.

14 JUDGE DAWSON: Have you ever seen
15 cylinders leaning such as those in the picture,
16 Joint Exhibit 2, that's on this screen, before?

17 THE WITNESS: Sure, yes.

18 JUDGE DAWSON: Okay. I mean, in
19 trucks of other drivers other than Mr.
20 Rottinghouse?

21 THE WITNESS: No. I can personally
22 vouch that I have seen it on my truck before.

23 JUDGE DAWSON: Okay.

24 Q. As far as your training that you've
25 received, is it appropriate to periodically

1 check the backs of your truck throughout the
2 day?

3 A. Yeah. A route driver would check
4 their route at every stop.

5 Q. And why would they do that?

6 A. They were physically delivering to
7 every stop. So they're automatically getting
8 up on their truck. And as they're going down
9 to unload cylinders they're looking up and down
10 the aisle way to check their cylinders.

11 Q. And why, as far as you know, why is
12 that policy in place?

13 A. To make sure you have a secure load
14 all day.

15 Q. And if -- how common is it that
16 someone would have to readjust their straps
17 throughout the day?

18 A. Very common.

19 Q. And just to be clear, you have seen
20 cylinders leaning like this before, at least in
21 your own truck?

22 A. Right. That's why I do a 50-mile
23 inspection. I'm an interbranch driver. So I
24 have to do an inspection every 50 miles. Or
25 after 50 miles. Let's just say that.

1 JUDGE DAWSON: Are you saying
2 "interbranch"?

3 THE WITNESS: Interbranch, yeah.

4 JUDGE DAWSON: What does that mean?

5 THE WITNESS: It's an Airgas to
6 Airgas location.

7 Q. And I apologize if I asked this
8 question already. But have you seen any other
9 employees disciplined for leaning cylinders?

10 A. No.

11 MR. BRINKER: Okay. I don't have
12 any more questions, your Honor.

13 JUDGE DAWSON: Okay. Cross?

14 MR. MURPHY: Nothing, your Honor.

15 JUDGE DAWSON: Okay. Mr. Perkins,
16 I will direct that you not discuss your
17 testimony or the questions asked with anyone.
18 And you may be excused. Thank you.

19 THE WITNESS: Thank you.

20 JUDGE DAWSON: And we can go off
21 the record.

22 (Off the record.)

23 JUDGE DAWSON: Back on the record.

24 And Mr. Brinker, have you concluded with your
25 case, with your witnesses, sir?

1 MR. BRINKER: Yes, your Honor.

2 JUDGE DAWSON: Okay. Are you
3 resting?

4 MR. BRINKER: Yes. We will rest.

5 JUDGE DAWSON: Okay. Then you're
6 resting. We're going to take a break. And if
7 you all will be back here at -- I'm going by
8 this clock. It's 1:53. But if you would be
9 back here at 2:45, okay? And we'll resume at
10 that time.

11 And I would ask that you all would
12 revisit or discuss trying to resolve the case
13 in some way. You know, I know we had talked on
14 the phone about different ways about, you know
15 -- I know one of the requests, reducing to a
16 verbal warning or -- there may be other ways
17 that you can resolve it. Perhaps shortening
18 the length of the discipline in the file. I
19 don't know how long it would stay in the file.
20 I don't know what the policy is or what here.

21 But there are different ways to try
22 to resolve things. So anyway, that's it. And
23 I'll see you all back at 2:45. Thank you.

24 (Off the record.)

25 JUDGE DAWSON: We're going to go

1 back on record. And we are starting with the
2 Respondent's case. And he is recalling
3 Mr. MacBride. And Mr. MacBride, you are still
4 under oath. Do you understand that, sir?

5 THE WITNESS: I do.

6 JUDGE DAWSON: You may proceed, Mr.
7 Murphy.

8 MR. MURPHY: Thank you.

9 DIRECT EXAMINATION OF MARK MacBRIDE

10 BY MR. MURPHY:

11 Q. Mark, how long have you been with
12 the company?

13 A. Next month there would be 22 years.

14 Q. And your current position is what?

15 A. Driver trainer.

16 Q. And how long have you held that
17 position?

18 A. Going on four years.

19 Q. And what are your responsibilities
20 in that position?

21 A. I work with all new incoming
22 drivers. Train them on all policies, safety
23 procedures. And different tasks they're going
24 to perform. Then I do a 90-day follow-up.
25 Review policies and procedures. And then once

1 a year I arrive with all my current drivers and
2 review policies and procedures and go over
3 safety. DOT compliance. Update any new safety
4 policies or things coming out.

5 Q. So are you the person with primary
6 responsibility for making sure drivers are
7 properly trained?

8 A. On policies and procedures, yes.

9 JUDGE DAWSON: And you've done that
10 for four years with new drivers?

11 THE WITNESS: Yes. New and
12 current. Both.

13 JUDGE DAWSON: Okay.

14 Q. How do you do it for current
15 drivers?

16 A. I do with every driver once a year.
17 Spend a whole day with them. Generally a whole
18 day. And we have a form that we go over, with
19 all the policies and procedures. And we
20 discuss, at the end of the trip, anything they
21 don't do or there's a problem, I kind of
22 highlight it. At the end of the trip I'll
23 review it. And go over that with them and
24 point out what I need them to work on.

25 Q. Thank you. In the normal course of

1 driving, do properly strapped cylinders move?

2 A. I would say no.

3 Q. Do they tilt?

4 A. No.

5 Q. Do they shift?

6 A. No.

7 Q. Describe the normal course of
8 driving, please?

9 A. If you have a correct following
10 distance and you're traveling at correct speed
11 and you need to come to a stop, at that point,
12 or a turn, your cylinders should not move at
13 all.

14 Q. What about typical ground
15 vibrations from --

16 A. Hitting a bump?

17 Q. Hitting a bump.

18 A. No. If cylinders are strapped,
19 they should not move.

20 Q. Is it a common occurrence for
21 cylinders to shift, tilt or otherwise move
22 during the normal course of travel?

23 MR. BRINKER: I'm going to object
24 to leading.

25 JUDGE DAWSON: I'm going to

1 overrule. I'm sorry. I'm going to sustain the
2 objection. This is your witness.

3 Q. Okay. In the normal course of
4 driving, do cylinders move?

5 A. No.

6 Q. Then why do we have a rule to check
7 the cylinders every 50 miles?

8 A. Just to review and be cautious with
9 carrying hazardous material. So everybody on
10 the road -- a road driver, at least every 50
11 miles, has to stop and check their load.

12 Q. Okay. Now, this is the first we've
13 heard of "road driver." What is this
14 distinction you seem to be indicating?

15 A. The distinction is that road driver
16 is traveling more than let's say 50 to 100
17 miles in one direction. A city driver is going
18 in and out of parking lots constantly.

19 Q. Does the 50-mile recheck rule apply
20 to city drivers?

21 A. No. Because the opinion is they're
22 on their truck within 50 miles.

23 Q. I see. Thank you.

24 JUDGE DAWSON: I'm sorry, what was
25 Mr. Rottinghouse, city or road?

1 THE WITNESS: He does everything
2 for us. So on that day, I'm not exactly sure
3 what his route was.

4 JUDGE DAWSON: So he does road and
5 city driving?

6 THE WITNESS: Yes. Mr.
7 Rottinghouse does both.

8 JUDGE DAWSON: Okay. Go on.

9 Q. If he was on the GE run, would that
10 have been city or road?

11 A. That would've been city.

12 Q. Now, you testified before that
13 slamming on brakes could cause movement of
14 cylinders, correct?

15 A. Excessive slamming on brakes could
16 cause moving of cylinders.

17 Q. What is your definition of slamming
18 on brakes?

19 A. Going 40, 50 miles an hour and
20 slamming on the brakes to the point you're
21 almost skidding would be excessive.

22 Q. And in that situation, one could
23 expect some movement of cylinders even if they
24 were properly strapped?

25 A. I'd say properly strapped -- no.

1 Properly strapped cylinders should not move on
2 your truck. Improperly strapped cylinders will
3 move on your truck.

4 JUDGE DAWSON: Can't have it both
5 ways. But go on.

6 Q. Well, let me ask this to help get
7 some clarification. If you're stopped at a
8 gate. You get out to open the gate. You get
9 back in the truck. And you start to proceed
10 through the open gate. And then, for whatever
11 reason, when the cab is lined up with the gate
12 you have to suddenly stop?

13 A. Are we speaking of the Cincinnati
14 Dayton Road property?

15 Q. Yes.

16 A. Okay. I've been on that property
17 several times.

18 Q. So you're starting from a stopped
19 position. You start to proceed through an open
20 gate. When your cab is lined up with the open
21 gate, you have to slam on the brakes. Is that
22 enough of a hard stop to cause properly
23 strapped cylinders to move?

24 A. I would say no.

25 MR. BRINKER: Objection, leading.

1 JUDGE DAWSON: I'm going to sustain
2 the objection.

3 MR. MURPHY: Well, there's been a
4 lot of testimony put on through 611C witnesses
5 about sudden braking causing properly strapped
6 or improperly strapped cylinders to move.

7 To the extent that this witness can
8 testify as someone very knowledgeable about
9 procedures and about strapping, I have to be
10 able to ask him whether moving from a
11 stationary position for a very brief period in
12 time is enough of a sudden stop to cause
13 cylinder shifting.

14 I don't really see how I can ask
15 the question with without using the phrase
16 "cylinders moving" or "sudden stop." How do I
17 ask that without using those terms?

18 JUDGE DAWSON: I'm going to reverse
19 my ruling and I'm going to allow it as a
20 hypothetical situation.

21 MR. MURPHY: Thank you.

22 Q. So starting from a stopped
23 position, starting to move, enough distance to
24 start to move through an open gate, for
25 instance, where your cab is lined up with the

1 opening. And then having to stop again,
2 suddenly. Is that enough of a rapid
3 deceleration or a sudden stop to cause properly
4 strapped cylinders to shift?

5 A. I would say absolutely not.

6 Q. Okay. Would they shift if they
7 were improperly strapped?

8 A. Yes.

9 Q. Okay. So describe for me what sort
10 of sudden stop would cause properly strapped
11 cylinders to shift, potentially, in your
12 experience?

13 A. Rear ending another vehicle.

14 Q. Okay.

15 A. 15 to 20 mile an hour, mashing your
16 brakes. We have what we call an alarm on our
17 trucks. And more than seven miles an hour in
18 less than three seconds, it alarms our trucks.
19 And that's considered a sudden stop, a term we
20 use.

21 JUDGE DAWSON: What is the alarm on
22 the truck?

23 THE WITNESS: We have onboard
24 logging systems that we're installing.

25 JUDGE DAWSON: That you're

1 installing now? Were they installed then?

2 THE WITNESS: I don't know that.

3 JUDGE DAWSON: Then it's not
4 relevant.

5 MR. MURPHY: Agreed.

6 MR. MURPHY: Thank you. Nothing
7 further.

8 JUDGE DAWSON: Do you have
9 questions, Mr. Brinker?

10 MR. BRINKER: I do, your Honor. If
11 I could just have one minute to review.

12 CROSS EXAMINATION OF MARK MacBRIDE

13 BY MR. BRINKER:

14 Q. Mr. MacBride, in your experience as
15 a driver trainer, have you ridden with other
16 drivers where cylinders were not properly
17 strapped?

18 A. I have.

19 Q. You have. So you've seen it
20 before?

21 A. Yes.

22 Q. Were those, as far as you know, did
23 you tell anyone in management that those
24 cylinders weren't strapped?

25 A. I have.

1 Q. And what happened with those
2 employees?

3 A. To be honest with you, I don't
4 administer any discipline. But I know there
5 has been some sort of discipline.

6 Q. There has been?

7 A. Yes.

8 JUDGE DAWSON: Has that been more
9 than one time?

10 THE WITNESS: Generally when I'm
11 riding with the guys, and I see something
12 wrong, we fix it at the scene. But while I'm
13 riding with them, I stop them then and tell
14 them -- because I'm not allowed to let them
15 perform an unsafe act. But if I walk in -- and
16 I have, it just recently happened. I walk on a
17 truck and a guy has cylinders unstrapped -- and
18 he was written up for that. Because he had one
19 strap on all his cylinders. Nothing was loose
20 that I could see. But they had one strap.

21 Q. So it's proper fastening if you
22 have one strap? Or do you need to have two
23 straps?

24 A. Airgas policy is two.

25 Q. Two straps?

1 A. On all cylinders.

2 Q. And I apologize, let me pull this
3 picture up here. As far as you're aware -- so
4 if you're looking at Joint Exhibit 2, here,
5 these two -- this picture, what is -- how many
6 straps are on these cylinders?

7 A. There are two.

8 Q. Getting back to these other drivers
9 that you have seen with loose straps, you said
10 a couple different things. Did you tell a
11 manager every time that you saw loose
12 cylinders?

13 A. I write it down.

14 Q. But did you tell management?

15 A. On my documentation I present that
16 to the driver. And I present it to the
17 management.

18 Q. And as far as you're aware, you saw
19 drivers with loose cylinders at the Cincinnati
20 Dayton facility?

21 A. The last time? No.

22 Q. I mean ever.

23 A. I can't say that.

24 Q. You don't know one way or the
25 other?

1 JUDGE DAWSON: You can't say what?

2 THE WITNESS: I can't say -- I
3 mean, to pinpoint -- have I seen any driver
4 there with loose cylinders?

5 Q. Yes.

6 A. I don't remember seeing anybody
7 that, definitely, it was loose.

8 Q. So you haven't seen them or you
9 don't know if you saw them or not?

10 A. I'm going to say I haven't.

11 Q. You have not seen them?

12 JUDGE DAWSON: You just testified
13 that you've seen it when you're riding with
14 them.

15 THE WITNESS: Not at their plant.

16 JUDGE DAWSON: These have been
17 employees from other plants. So when you just
18 testified that you had ridden with, done your
19 rides with the employees and the driver's, and
20 you've seen some cylinders not properly
21 strapped, so you're saying those were employees
22 of another plant or another company or what?

23 THE WITNESS: At other facilities.

24 JUDGE DAWSON: At other facilities?

25 THE WITNESS: Yeah. I have 17

1 locations.

2 JUDGE DAWSON: Okay. So does Mr.
3 Froslear have anything to do with those
4 locations?

5 THE WITNESS: He would have to do
6 with five of those other locations.

7 JUDGE DAWSON: Okay. Go on.

8 Q. Do you have of any knowledge, one
9 way or the other of any other drivers who have
10 been, who have received written warnings for
11 cylinders that were leaning?

12 A. That were leaning? I can't say
13 particularly for lean. But I know other
14 drivers might -- that have been written up for
15 loose cylinders.

16 Q. For loose cylinders. And what is
17 your definition of "loose cylinders"?

18 A. Anything that moves. Period.

19 Q. You had talked about the difference
20 between city drivers and road drivers. Could
21 you -- you said that city drivers do
22 inspections every 50 miles. However this does
23 not apply to -- road drivers do checks over 50
24 miles. But city drivers, they don't do them
25 every 50 miles. And that's because they do

1 those checks between the two stops, correct?

2 A. They're up on their trucks
3 constantly. So, yes.

4 Q. And when they go up on their
5 trucks, they check the cylinders. And what if
6 they noticed that cylinders were tilted or
7 loose or the straps weren't as tight as they
8 should be? What would they do?

9 A. They would straighten them up.

10 Q. Does that happen on occasion?

11 A. I would say it could.

12 Q. It could. Does it, in your
13 experience?

14 A. Yes, I've seen it before.

15 Q. Okay. So you've been there for 22
16 years. How often do you see somebody go check
17 their load and retighten it in the middle of
18 their day? How often does that happen?

19 A. I've been doing this job for four
20 years. I've been in 500 trucks. Probably a
21 couple dozen times.

22 Q. And to your knowledge, were those
23 employees given any sort of discipline for
24 that?

25 A. I don't believe so.

1 Q. Okay. What is the difference
2 between a severe -- I'm sorry, a severe DOT
3 violation and a minor DOT violation?

4 A. The difference is categorizing
5 compliance safety and accountability catalog is
6 -- detriment to life and longevity of the
7 penalties. And what it is, the severity of the
8 penalty is based on how much damage it could do
9 to person and/or society. So the question, you
10 want to know what the difference in penalties?

11 Q. Yes. What's the difference?

12 A. Unsecure load is just something
13 that the federal motor carriers cracks down on
14 everybody. And it's a huge penalty because it
15 can go from loads falling off on the side of
16 the road, to driving down the road and a
17 cylinder bouncing off your truck and going
18 through a windshield, to a cylinder --

19 In a pallet of 12 cylinders, and
20 I've seen a guy get up on a truck. Take two
21 hands, and if he moves it that's considered an
22 out-of-service violation. So the severity is
23 pretty big. It's a broad range.

24 Q. Okay. Have you ever --

25 JUDGE DAWSON: Excuse me. I have a

1 question. About this picture, here, from Joint
2 Exhibit 2, these cylinders, are they free
3 standing with straps around them? And not just
4 these cylinders. But I guess any cylinders,
5 other than the one -- well, maybe those two,
6 are they strapped to the truck or the trailer
7 or whatever, or are they just in straps,
8 sitting on the back of a truck?

9 THE WITNESS: They're in a pallet.
10 There's a steel pallet that those straps are
11 coming through. And that's over what we call a
12 tombstone. It's an 18-inch piece of steel. It
13 slides over top of that. And then we have a
14 strap that goes over that, and straps the
15 pallet down to the tombstone.

16 JUDGE DAWSON: So they are attached
17 to something.

18 THE WITNESS: The cylinders aren't.
19 The pallet is. The pallet's attached to the
20 truck. The cylinder is then attached to the
21 pallet.

22 JUDGE DAWSON: Okay. All right.
23 Go on, Mr. Brinker.

24 Q. From looking at this picture, and
25 seeing the tilt there, are these cylinders in

1 danger of flying off the vehicle?

2 A. At that moment, they're going to
3 move again.

4 Q. But they're not in danger of coming
5 off the vehicle?

6 A. If they move, that cylinder will --

7 Q. Can you answer the question yes or
8 no?

9 A. Are they in danger of flying off
10 the vehicle?

11 Q. Are they in danger of coming off
12 the vehicle, the way they're positioned now?

13 A. Yes. They're loose.

14 Q. So they are in danger of coming off
15 the vehicle in this?

16 A. Yes.

17 JUDGE DAWSON: And you think
18 they're loose for what reason?

19 A. Because there's no way those
20 cylinders were loaded at that angle. So they
21 had to move.

22 JUDGE DAWSON: So if they moved at
23 all, they were loose?

24 THE WITNESS: Yes.

25 Q. But if they move at all, that means

1 that they are in danger of coming off of the
2 vehicle?

3 A. They can move, they're loose.

4 Q. And this is across the board, no
5 matter what, if they move at all they're in
6 danger of going off of the vehicle?

7 A. If they move they're considered an
8 unsecure load.

9 Q. And you have seen cylinders move
10 before when you've ridden along with other
11 employees, correct?

12 A. Yes.

13 Q. Okay. And you're alleging that
14 this is a -- is this a severe DOT violation?

15 A. Yes.

16 Q. Okay.

17 A. Yes. Out-of-service is severe.

18 Q. And so each of these employees,
19 every time that management was notified -- that
20 a severe DOT violation occurred when you were
21 on the vehicle with them?

22 A. I wrote it down that they had
23 cylinders that were moving, yes.

24 Q. Okay. Did you explain to
25 management that this was a severe DOT

1 violation?

2 A. Yes.

3 Q. Every time?

4 A. Every time.

5 MR. BRINKER: That may be all the
6 questions I have for you right now.

7 Q. You mentioned rear ending another
8 vehicle would move cylinders. Getting into an
9 accident in your truck, is that a more severe
10 violation than having cylinders that tilt?

11 A. I would say getting into an
12 accident is more severe, yes.

13 Q. Would cylinders coming, actually
14 coming loose, not just tilting, but coming out
15 of their straps and are freely moving inside
16 the pallet on the back of the truck, is that
17 more severe?

18 A. That's the end of the -- this is
19 moving towards that. So I'd say moving
20 cylinders are moving cylinders, in my opinion.

21 Q. Okay. And that's your opinion.
22 Have you seen -- in your experience on the
23 road, have you seen a Department of
24 Transportation, personally seen someone with
25 the Department of Transportation give the same

1 warning or whatever happens, the punitive
2 process there, do they give the same sort of
3 punitive penalty for these leaning cylinders
4 and for cylinders that are freely moving about
5 the back of the truck?

6 A. Yes. It's out-of-service because
7 it's an insecure load. That's how they write
8 it.

9 Q. So it's the same one?

10 A. Yes. They write it the same way.

11 Q. Have you seen any DOT employee
12 write up anyone at the Cincinnati Dayton
13 facility for leaning cylinders before?

14 A. I have not.

15 Q. Okay. Have you seen them for other
16 facilities?

17 A. I have.

18 Q. And do you have any idea of whether
19 or not those employees were given written
20 warnings?

21 A. Yes.

22 Q. They were?

23 A. Yes. Our out-of-service violations
24 receive written warnings.

25 Q. And when that happened, they were

1 driving on the public streets, correct?

2 A. Yes.

3 Q. To your knowledge, did Mr.
4 Rottinghouse ever drive this on public streets?

5 A. I have no -- the way I understand
6 it, he pulled into the parking lot. So yes, he
7 was on a public street.

8 Q. Do you know if they were loose when
9 he was on the public street, or was it -- you
10 don't know one way or the other?

11 A. No.

12 Q. And I believe we went over this
13 already. But when you would look at the back
14 of your truck and see something like that, the
15 proper action is to what?

16 A. Stop the truck. Get out and fix
17 it.

18 Q. Now, if you as a manager saw this,
19 if you pulled into the lot and you saw him with
20 these cylinders like this, what you would you
21 do?

22 A. If he was not around his truck, I'd
23 go find my driver that was doing it. And get
24 him out there and tell him, you're driving
25 around with loose cylinders, let's get up and

1 fix your truck. That's what I would do.

2 MR. BRINKER: That's all the
3 questions I have.

4 JUDGE DAWSON: Okay, any more?

5 MR. MURPHY: Nothing more. And we
6 rest.

7 JUDGE DAWSON: Okay. Sir, I will
8 direct that you not discuss your testimony, as
9 I said before, or questions asked with anyone.
10 And thank you. You may be excused.

11 Okay. We can go off the record.

12 (Off the record.)

13 JUDGE DAWSON: Okay. We can go
14 back on the record. We've concluded with the
15 testimony in this case. And notifying, I will
16 prepare and file with the Board my decision in
17 this proceeding. And a copy will be served on
18 each of the parties.

19 You are reminded to refer to the
20 Board's rules and regulations for information
21 regarding the filing of briefs and proposed
22 findings for my consideration. And regarding
23 procedures before the Board after the issuance
24 of a judge's decision.

25 Now that all the evidence is in,

1 you have a better opportunity to assess your
2 chances regarding the outcome of the issues
3 than you had at the onset or the outset of the
4 trial. All parties should carefully weigh the
5 risks entailed and decide whether an amicable
6 settlement of the issues might not offer a more
7 satisfactory solution.

8 And I will say on the record what I
9 have said on and off the record, that I think
10 that would be best in this case.

11 Settlement may be arranged now or
12 at any time before I issue my decision. If
13 it's after now or today, then you need to
14 notify me that that is what you are doing as
15 soon as possible.

16 I will allow until March 22nd, 2016
17 for the parties to file their briefs and any
18 proposed findings and conclusions. And that
19 date is no more than 35 days -- or it is 35
20 days from the close of the hearing, which would
21 be today. And if anybody wants to double check
22 me on the that 35 days, feel free to do so.

23 And briefs should be filed directly
24 with the Judge's Division in Washington D.C.,
25 regardless of whether they are mailed or

1 e-filed.

2 Any requests for an extension of
3 time for the filing of briefs must be made in
4 writing to either the Chief Judge or the Deputy
5 Judge. That would be Judge Gionacci or Judge
6 Amchan in Washington D.C., and served on the
7 other parties.

8 The positions of the parties
9 regarding the extension should be obtained and
10 set forth in the request. It is a policy of
11 the Division of Judges to grant discretionary
12 extensions only when they are clearly
13 justified. Requests for extensions must
14 contain specific reasons and show that the
15 requesting party cannot reasonably meet the
16 current deadline.

17 And with extensions, as always --
18 it's always better if everybody can agree on an
19 extension, or to get everyone else's consent
20 before filing the motion for the extension.
21 And it's also best to do it as soon as
22 possible, if you think that you may not be able
23 to reasonably meet the deadline.

24 And therefore, nothing further.

25 And I thank you all for your presentations of

1 -- efficient presentations of your cases. And
2 your professionalism in handling your cases
3 before me today.

4 And at this time the trial is
5 closed, officially closed. And we are going
6 off the record.

7 (Off the record.)

8 JUDGE DAWSON: Back on the record.
9 I'm sorry. We're back on the record. I am
10 reopening the record because I did not rule on
11 General Counsel Exhibit 5, the videotape. And
12 I said that I was reserving my ruling, and I
13 didn't go back.

14 I am going to admit it into the
15 record. And I will give it whatever weight
16 that I feel it deserves, if any. And your
17 objection was recorded on the record. And I
18 understand the objection, and I will give it
19 whatever weight I feel it deserves. So that's
20 it. I think that's everything.

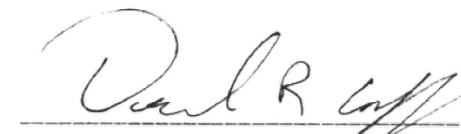
21 Thank you all again. And now the
22 record is officially closed.

23 (Thereupon the hearing concluded at
24 3:34 p.m.)

25

1 CERTIFICATION.

2
3 This is to certify that the attached
4 proceedings before the National Labor Relations
5 Board (NLRB), Region 9 In the Matter of AIRGAS
6 USA LLC, and STEVEN WAYNE ROTTINGHOUSE, JR.
7 Case No. 09-CA-158662, at Cincinnati, Ohio on
8 February 16th, 2016, was held according to the
9 record, and that this is the original,
10 complete, and true and accurate transcript that
11 has been compared to the recording, at the
12 hearing, that the exhibits are complete and no
13 exhibits received in evidence or in the
14 rejected exhibit files were missing.

15
16 

17 Daniel R. Cuff, Notary Public

18 within and for the State of Ohio.

19
20 My commission expires July 27, 2016.
21
22
23
24
25

Nos. 18-1686 & 18-1771
Board Case No. 09-CA-158662

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

VOLUME II

EXHIBITS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

AIRGAS USA LLC

and

Case 09-CA-158662

STEVEN WAYNE ROTTINGHOUSE JR.,
AN INDIVIDUAL

AFFIDAVIT OF SERVICE OF: **Complaint and Notice of Hearing (with forms
NLRB-4338 and NLRB-4668 attached)**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 18, 2015, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Clyde Froslear, Regional Manager
Airgas USA, LLC
10031 Cincinnati-Dayton Rd
Cincinnati, OH 45241

REGULAR MAIL

Mr. Michael C. Murphy
Airgas USA, LLC
259 N. Radnor-Chester Road, Suite 100
Radnor, PA 19087-5255

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED**

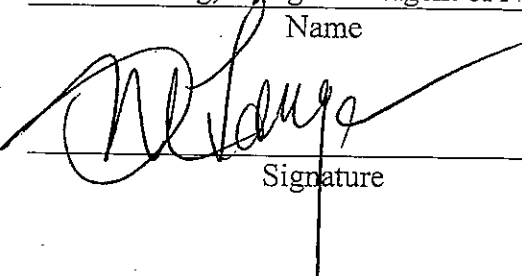
Mr. Steven Wayne Rottinghouse Jr.
4221 Harding Ave.
Cincinnati, OH 45211

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED**

Date

L. Hellrung, Designated Agent of NLRB

Name


Signature

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature X <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>	
<p>1. Article Addressed to:</p> <p>Mr. Michael Murphy Airgas USA, LLC 259 N. Radnor - Chester Rd. Suite 100 RADNOR PA 19087-5255</p>		<p>B. Received by (Printed Name) <i>DEBORAH FLOWERS</i></p> <p>C. Date of Delivery <i>NOV 23 2015</i></p>	
<p>2. <i>158662</i></p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>	
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Not Labor Relation Board
Region 9
John Weld Peck Fed Bldg.
550 Main St Rm 3003
Cincinnati, OH 45202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

AIRGAS USA, LLC

and

Case 09-CA-158662

STEVEN WAYNE ROTTINGHOUSE JR.,
AN INDIVIDUAL

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Steven Wayne Rottinghouse Jr., an Individual (Rottinghouse). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Airgas USA, LLC (Respondent) has violated the Act as described below.

1. The charge in this proceeding was filed by Rottinghouse on August 24, 2015, and a copy was served on Respondent by U.S. mail on August 25, 2015.

2. (a) At all material times, Respondent has been a Delaware limited liability company with an office and place of business in Cincinnati, Ohio (Respondent's facility), and has been engaged in the retail sale and distribution of industrial gases and related products.

(b) In conducting its operations during the 12-month period ending November 1, 2015, Respondent derived gross revenues in excess of \$500,000.

(c) Respondent, during the same time period referenced above in paragraph 2(b), purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Ohio.

(d) At all material time, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Clyde Froslear - Operations Manager
Dave Luehrmann - Facility Manager

4. (a) About August 5, 2015, Respondent issued a written warning to its employee Steven Rottinghouse, Jr.

(b) Respondent engaged in the conduct described above in paragraph 4(a) because Rottinghouse gave testimony to the Board in the form of an affidavit in Cases 09-CA-145718 and 09-CA-152301, and because he filed charges in Cases 09-CA-152301 and 09-CA-155497.

5. By the conduct described above in paragraph 4, Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(1) and (4) of the Act.

6. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before December 2, 2015 or postmarked on or before December 1, 2015.**

Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number,

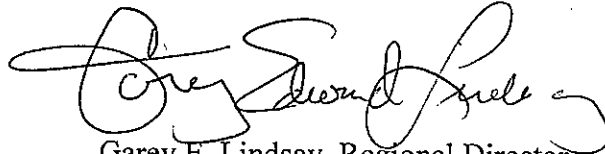
and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **February 16, 2016, 9 a.m. at Room 3003, John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this

proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: November 18, 2015

A handwritten signature in black ink, appearing to read "Garey E. Lindsay", is written over a circular embossed seal of the National Labor Relations Board.

Garey E. Lindsay, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Attachments

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 09-CA-158662

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Clyde Froslear, Regional Manager, Airgas USA, LLC, 10031 Cincinnati-Dayton Rd,
Cincinnati, OH 45241

Mr. Michael C. Murphy, Airgas USA, LLC, 259 N. Radnor-Chester Road, Suite 100,
Radnor, PA 19087-5255

Mr. Steven Wayne Rottinghouse Jr., 4221 Harding Ave., Cincinnati, OH 45211

Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

(OVER)

Form NLRB-4668
(6-2014)

- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.
- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET
FORM NLRB-801
(2-09)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case 09-CA-158662 Date Filed August 24, 2015

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

AIRGAS USA, LLC

b. Tel. No. (513) 563-7900

c. Cell No. (513) 484-8141

f. Fax No. (513) 563-7920

g. e-Mail

h. Number of workers employed
20

d. Address (Street, city, state, and ZIP code)

10031 CINCINNATI-DAYTON RD
CINCINNATI, OH 45241

e. Employer Representative

CLYDE FROSLER
REGIONAL MANAGER

i. Type of Establishment (factory, mine, wholesaler, etc.)
TRANSPORTATION OF INDUSTRIAL GAS

j. Identify principal product or service
PROPANE AND OTHER INDUSTRIAL GASES

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1)(A) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On about August 6, 2015, the above-named Employer issued Steven Wayne Rottinghouse Jr. a written warning in retaliation for his protected Union activities and because he filed charges with the National Labor Relations Board.

3. Full name of party filing charge (If labor organization, give full name, including local name and number)

STEVEN WAYNE ROTTINGHOUSE JR.

4a. Address (Street and number, city, state, and ZIP code)

4221 HARDING AVE
CINCINNATI, OH 45211-4505

4b. Tel. No. (513) 899-5327

4c. Cell No. (513) 607-3557

4d. Fax No.

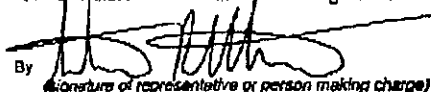
4e. e-Mail

steverottinghouse@yahoo.com

6. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

5. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By 
(Signature of representative or person making charge)

STEVEN WAYNE ROTTINGHOUSE JR.

(Print/type name and title or office, if any)

Tel. No. (513) 899-5327

Office, if any, Cell No.
(513) 607-3557

Fax No.

e-Mail

steverottinghouse@yahoo.com

Address 4221 HARDING AVE, CINCINNATI, OH 45211-4505

8-24-15
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

G. G. EX. 10 a

RECEIVED
NLRB
REGION 9

2015 AUG 24 AM 11: 52

CINCINNATI, OH

AIRGAS USA LLC
Case 09-CA-152301

Confidential Witness Affidavit

I, Clyde A. Froslear, being first duly sworn upon my oath, state as follows:

I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.

I work at 10031 Cincinnati Dayton Road, Cincinnati, OH 45241

My work telephone number (including area code) is 513-563-8070

My cell phone number (including area code) is 513-464-6141

My e-mail address is clyde.froslear@airgas.com

I am employed by Airgas USA, LLC

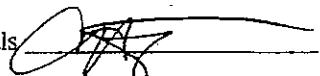
located at 10031 Cincinnati Dayton Road, Cincinnati, OH 45241

1 I have been employed by Airgas for about 12 to 13 years. I currently work as the
2 Operations Manager for Airgas. In that role, I oversee about 10 locations with respect to the
3 operations for each facility. I have held the Operations Manager role for about the last 8 years.

4 Every month the Employer has a safety meeting. At the facility involved here, the
5 meetings are usually run by Dave Luehrmann, Plant Manager. At a safety meeting on about
6 April 28 or 29, 2015, I asked Luehrmann if I could speak at the end of the meeting. There were
7 two meetings that day, one morning and one afternoon, and I spoke at both. I gave the same talk
8 at both meetings.

Privacy Act Statement

The NLRB is asking you for the information on this form on the authority of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the NLRB in processing representation and/or unfair labor practice cases and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). Additional information about these uses is available at the NLRB website. Providing this information to the NLRB is voluntary. However, if you do not provide the information, the NLRB may refuse to continue processing an unfair labor practice or representation case, or may issue you a subpoena and seek enforcement of the subpoena in federal court.


G.C. Ex 2

Case 09-CA-152301

7/13/2015

1 The reason I wanted to speak with the employees was to make sure they understood the
2 disciplinary process. In the morning meeting, Luerhmann was also present. I probably spoke for
3 less than 10 minutes in each meeting. Steven Rottinghouse was present at the morning meeting
4 as well, along with several other drivers who were there at 6:30 AM. At the meeting, I wanted to
5 make clear to employees that once they violated a rule for the second time, they would receive a
6 written warning. In the collective bargaining agreement for this facility, the disciplinary process
7 says that an employee will be given a written warning after the first violation of a rule.
8 However, for example, if we see an employee not wearing safety glasses, we will first tell that
9 employee to make sure they are wearing their glasses, however, if we see the same infraction
10 again, we will give that employee a written warning.

11 In the meetings with employees, I used that very same safety glasses hypothetical to
12 discuss the disciplinary process. In the meetings with employees, I never said that the
13 disciplinary process was changing, nor did I announce a new change to the disciplinary process.
14 I said that the Employer had previously gone through the process with the National Labor
15 Relations Board where the National Labor Relations Board asked the Employer to show that it
16 was consistent with how it disciplined employees, so I wanted to simply reinforce with
17 employees what the disciplinary process was so that all employees were clear about how they
18 would be disciplined. I never used a hypothetical in these meetings that dealt with an employee
19 taking too long of a break.

20 In the meetings, I did say that recently someone had reported a complaint to OSHA that
21 we were lacking in our safety program. I said that an OSHA representative had come in and
22 asked to see our manuals and other materials related to our safety program, and walked away

Case 09-CA-152301

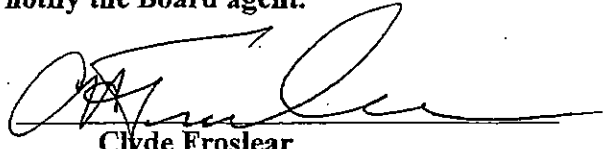
7/13/2015

- 1 from the meetings having said the Employer had an excellent safety program, so I credited the
- 2 employees in the meeting with doing a good job helping maintain the safety program.

I am being provided a copy of this Confidential Witness Affidavit for my review. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this Confidential Witness Affidavit consisting of 3 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct. However, if after reviewing this affidavit again, I remember anything else that is important or I wish to make any changes, I will immediately notify the Board agent.

Date: July 13, 2015

Signature: 

Clyde Froslear

Signed and sworn to before me on July 13, 2015 at

Cincinnati, OH


DANIEL GOODE

Board Agent

National Labor Relations Board

AIRGAS USA LLC
Case 09-CA-152301

Confidential Witness Affidavit

I, Dave Luchrmann, being first duly sworn upon my oath, state as follows:

I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.

I work at 10031 Cincinnati Dayton Road, Cincinnati, OH 45241

My home telephone number (including area code) is 513-563-8070

My cell phone number (including area code) is 513-200-0433

My e-mail address is

I am employed by Airgas USA, LLC

located at 10031 Cincinnati Dayton Road, Cincinnati, OH 4541

1 I have been employed by Airgas since Airgas purchased the previous company that I
2 worked for. I currently work as the Branch/Facility Manager. In that role, I run the 10031
3 Cincinnati Dayton Road plant with respect to the operations of the facility. I have been Branch
4 Manager for Airgas since Airgas purchased the previous company that I worked for.

5 Around the end of April 2015, I ran a scheduled safety meeting, one in the morning and
6 one in the afternoon. Prior to the meeting, Operations Manager Clyde Froslear asked me if he
7 could speak at my meetings on that day. I was present for both meetings. Driver Steven
8 Rottinghouse was at the morning meeting. I would estimate that Froslear spoke for about 5
9 minutes in each of the meetings. In the meetings, Froslear spoke about the disciplinary

Privacy Act Statement

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Case 09-CA-152301

7/13/2015

1 procedure for employees and told employees that he wanted them to be aware of the procedure.
2 Froslear proposed a hypothetical to illustrate his point about the disciplinary procedure.
3 Specifically, he used safety glasses as the hypothetical situation. Froslear said if a manager saw
4 an employee without safety glasses, the manager would verbally remind the employee to make
5 sure he was wearing his safety glasses. If the manager then saw the same employee committing
6 the same infraction, the manager would give that employee a written warning. That is the same
7 disciplinary process that has always been in place, Froslear simply wanted to make sure all
8 employees understood it. Froslear said that the Employer had gone through the process with the
9 National Labor Relations Board and that the National Labor Relations Board wanted to know if
10 the Employer had disciplined employees the same way, so he wanted to reiterate the disciplinary
11 process so everyone would know how they would be disciplined. Froslear did not change the
12 disciplinary process or procedure in those meetings, nor did he threaten to change the
13 disciplinary process in those meetings. He simply reiterated what the procedure was so
14 employees were clear.

15 I remember Froslear mentioning something about OSHA in the meetings, but I do not
16 recall what he said. Froslear gave the same talk in each of the two meetings. I do not recall if
17 there were any questions from employees about what Froslear said. Froslear never used a
18 hypothetical about an employee that took too long of break when discussing the disciplinary
19 procedure.

Case 09-CA-152301

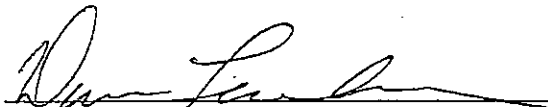
7/13/2015

I am being provided a copy of this Confidential Witness Affidavit for my review. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this Confidential Witness Affidavit consisting of 3 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct. However, if after reviewing this affidavit again, I remember anything else that is important or I wish to make any changes, I will immediately notify the Board agent.

Date: July 13, 2015

Signature:


Dave Luerhmann

Signed and sworn to before me on July 13, 2015 at

Cincinnati, OH


DANIEL GOODE

Board Agent

National Labor Relations Board

Airgas**COUNSELING STATEMENT**

Name: Bill Huff Date: 03 10 2011
 Location: Cincinnati-Dayton Rd Supervisor/Manager: Dave Luehrmann

Written Counseling

The above named associate is being counseled for the following reason(s):

Transporting unsecured cargo

Upon your return from Richmond Indiana on March 8th 2011, it was discovered that there was a loose cylinder on its side on the floor of the trailer, one pallet with unsecured cylinders & another pallet containing liquid containers only secured with one strap.

It is your responsibility as a commercial motor vehicle driver to ensure all cargo transported is secured to the vehicle and to each other and to protect from shifting or falling. You are also required to inspect your load before and during the course of transportation.

It is an expectation of your position and part of your job performance that you follow policies and procedures on securing loads provided by DOT and Airgas. You are required to secure your cargo properly before/after each delivery and abide by all applicable DOT regulations and Airgas Safety and Driver requirements – no exceptions. Violations of this kind put you, the public our customers and the company at serious risk from both a safety and profitability perspective.

Recommended action:

You must show immediate and consistent improvement on load securement of any and all cargo. You will review the DOT/Safecor and Driver requirements for securing cylinders with your supervisor next week and a ride with the driver trainer will be scheduled within the next 3-4 weeks.

Consequences of not following recommended action:

Securing your cargo/cylinders is a requirement for you as a professional driver for Airgas. When you do not follow DOT, Safecor and Airgas standard operating procedures you are impacting your job performance in a negative way. Failure to comply with all applicable rules, regulations, laws and Airgas policies and procedures now and consistently in the future, will lead to further disciplinary action including termination.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency (ies) and what will be required of him/her to correct it (them).

Associate's Signature _____ Date _____

Supervisor/Manager's Signature _____ Date 3/10/11

Witness' Signature (if applicable) _____

Date 3/10/2011

*R.T.S. until Monday
 wants Barry to Review*

3/10/11

Airgas

COUNSELING STATEMENT

Name: John Bowman Date: 6/16/2011
Location: Cincinnati Dayton Road Supervisor/Manager: Dave Luehrmann

Written Counseling

The above named associate is being counseled for the following reason(s):

Safety:

Failure to practice safe backing operating procedures / G.O.A.L. while making a delivery 06_13_2011. Backing into a car was the result of not following this procedure.

Recommended corrective action:

1. Review safe backing operating procedure with manager.
2. To schedule our driver trainer to ride with you and also review G.O.A.L

John:

The expectation is that our drivers make the correct decisions while driving to not put themselves in a position that could cause an accident / incident and always have control of their vehicle.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

John Bowman 6/16/11 [Signature] 6/16/11
Associate's Signature Date Supervisor/Manager's Signature Date

Witness' Signature (if applicable) _____ Date _____

Airgas**COUNSELING STATEMENT**

Name: Jack Baker Date: 11/15/2011
 Location: Cincinnati Dayton Road Supervisor/Manager: Dave Luehrmann

Warning Letter

The above named associate is being counseled for the following reason(s):

Safety: Observed not wearing safety glasses on 11/14/2011 & again on 11/15/2011.

Recommended corrective action:

Review PPE requirements with manager.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

 Associate's Signature Date

 Supervisor/Manager's Signature Date

 Witness' Signature (if applicable) Date

Airgas**COUNSELING STATEMENT**

Name: Jack Baker Date: 5/17/2012
Location: Cincinnati Dayton Road Supervisor/Manager: Dave Luehrmann

Written Warning

The above named associate is being counseled for the following reason(s):

Failure to provide Airgas complete and correct Trip Load Verification and Hazardous Material Manifest. These actions cause incorrect cylinder balances at our customer, incorrect stock level internally and violates DOT requirements.

Recommended corrective action:

To review training on load verification and haz mat requirements with your manager. To sign training documents acknowledging your understand of these requirements.

Consequences of not following recommended action:

It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

[Signature] 5-22-12
Associate's Sign Date Supervisor/Manager's Signature Date
[Signature] 5/22/12
Witness Signature (if applicable) Date

Airgas**COUNSELING STATEMENT**

Name: Jack Baker Date: 10 08 2012
 Location: Cincinnati Dayton Road Supervisor/Manager: Dave Luehrmann

Suspension

The above named associate is being counseled for the following reason(s):

While running your route on 10/3/2012, during a DOT inspection it was discovered that you were not in possession of a valid medical certificate.

It is your responsibility as a commercial motor vehicle driver to ensure you carry a valid driver's license and medical examination certificate. This is not the first issue you have had following DOT compliance as an Airgas driver.

Recommended corrective actions:

1. Pending a full, no restriction release back to work, a three day suspension will be issued.
2. Upon return from the suspension it is an expectation of your position and part of your job performance that you show immediate and consistent improvement following policies and procedures provided by DOT, SAFECORE & Airgas Driver requirements.

Consequences of not following recommended action:

It is your responsibility to follow DOT, Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Associate's Signature _____ Date _____

Supervisor/Manager's Signature _____ Date 10/8/12

Witness' Signature (if applicable) _____

Date 10/8/12 EMPLOYEE REFUSED TO SIGN

Airgas**COUNSELING STATEMENT**

Name: Justin Hollander Date: 9/4/2013
 Location: Cincinnati Dayton Rd Plant Supervisor/Manager: David Luehrmann

X Verbal Counseling

The above named associated in being counseled for the following reason(s):

On Friday, August 30th, you left grease on the steering wheel and knob of one of the forklifts. This was discovered when another employee went to use the forklift and got grease all over his hands. If not discovered, the forklift operator's hands could have slipped off of the controls, causing an accident.

Recommended correction action:

Airgas is committed to regard safety as the most important aspect of the job by not allowing unsafe conditions or practices to exist.

As an Airgas employee, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas.

Be aware of your actions and follow basic housekeeping by cleaning up your work area and after any spills and accidents you may have.

Consequences of not following recommended action:

Failure to follow this, as well as any and all Airgas Safety Rules in the future will lead to further disciplinary action up to and including termination.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them). Associate understands that employment remains terminable at-will and further that if he/she fails to correct the noted deficiencies, or if any other deficiencies or misconduct occurs, employment may be terminated immediately.

Justin Hollander 9/5/13
 Associate's Signature Date

David Luehrmann 9/5/2013
 Supervisor/Manager's Signature Date

[Signature]
 Witness Signature (if applicable)

9/5/13
 Date

Airgas**COUNSELING STATEMENT**

Name: Justin Hollander Date: 9/6/2013
Location: Cincinnati Dayton Rd Plant Supervisor/Manager: Clyde Froslear

X Written Warning

The above named associated in being counseled for the following reason(s):
Safety Violation

On Thursday, 9/5, I observed you not wearing your seat belt while operating a forklift. The Work Safety Rules and Forklift Safety Rules both clearly state that you must wear a seat belt when operating a forklift.

Recommended correction action:


We expect immediate and consistent improvement in following ALL Airgas Safety Rules and SOP's immediately and on an on-going basis. It is not acceptable to change the behavior for a short time and revert back to practices that do not adhere to Airgas Safety Rules.

As mentioned on your Verbal Warning issued to you on 9/5/13, Airgas is committed to regard safety as the most important aspect of the job by not allowing unsafe conditions or practices to exist. We maintain strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies.


Consequences of not following recommended action:

Failure to follow this, as well as any and all Airgas Safety Rules and SOP's in the future will lead to further disciplinary action up to and including termination.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them). Associate understands that employment remains terminable at-will and further that if he/she fails to correct the noted deficiencies, or if any other deficiencies or misconduct occurs, employment may be terminated immediately.


Associate's Signature Date 9/5/13


Supervisor/Manager's Signature Date 9/6/13


Witness' Signature (if applicable) Date 9/6/13

Airgas**COUNSELING STATEMENT**

Name: Terry Carlo Date: 9/6/2013
Location: Cincinnati Dayton Rd Plant Supervisor/Manager: Clyde Froslear

X Verbal Counseling

The above named associate is being counseled for the following reason(s):

Failure to wear proper PPE

On Wednesday, 9/4, I observed not wearing the proper PPE (leather gloves) when filling high pressure cylinders.

You have been trained on the PPE requirements when handling cylinders. It is part of your work performance to ensure that you are following Airgas' standard operating and safety procedures at all times. There are no exceptions to this. Not wearing gloves while handling cylinders is a SAFECOR and Airgas Safety violation. More importantly, not following Safety procedures puts your own body/health in danger.

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies.

Recommended corrective action:

You are expected to adhere to all safety rules and contact your supervisor or a member of the Safety Team if you have questions. We value your contributions to the company and expect immediate and consistent improvement in following these policies and practices.

You must adhere to company standard operating and safety procedures immediately and consistently into the future, without exception. It is not acceptable to improve for a period of time only to revert back to this behavior in the future.

Consequences of not following recommended action:

Failure to follow the recommendations of this corrective action and sustain work performance and conduct may result in additional corrective action up to and including termination of your employment with Airgas Great Lakes.

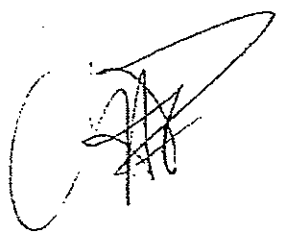
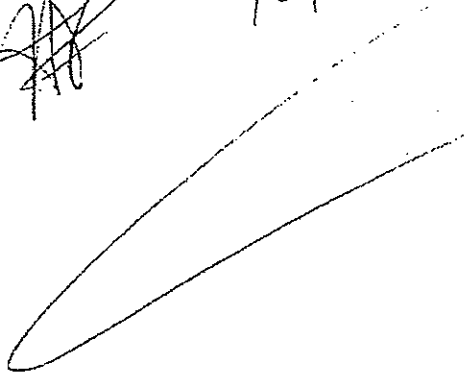
The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them). Associate understands that employment remains terminable at-will and further that if he/she fails to correct the noted deficiencies, or if any other deficiencies or misconduct occurs, employment may be terminated immediately.

Terry Carlo 9-6-13 Clyde Froslear 9/6/13
Associate Signature Date Manager's Signature Date
1. [Signature] 9/6/13
8

10/30/2013

Steve and I met after the safety meeting on 10/30/2013 to review his mistake he made on load verification. He said he had talked with Eric about it on 10/29/2013. Steve completed his paperwork working off of what was going to be loaded vs. what was really loaded.

All supporting documents are attached.

 10/30/13


Airgas**COUNSELING STATEMENT**

11/12/13

Name: Edger Gene Reed Date: 10/28/2013
 Location: Cin-Day Road Plant Supervisor/Manager: David Luehrmann

Verbal Counseling

The above named associate is being counseled for the following reason(s):

DOT Violation

Last Friday, 10/18, we received a complaint through SmithSafe saying you were on the phone. You verified that you were, indeed, on the phone at that time and phone record shows that you made a phone call at around the same time the complaint was made. This DOT violation could have made you subject to a \$2,570 fine and Airgas subject to an \$11,000 fine.

Recommended corrective action:

You are an experienced employee and we value your contributions to the company, but expect immediate and consistent improvement in following all DOT and Airgas Safety policies and practices.

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies.

Consequences of not following recommended action:

Failure to follow DOT and Airgas procedures and policies will result in further disciplinary action, up to and including termination of your employment with Airgas, USA, LLC

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them). Associate understands that employment remains terminable per the conditions of the collective bargaining agreement and that if he/she fails to correct the noted deficiencies, or if any other deficiencies or misconduct occurs, employment may be terminated immediately.

Edger Gene Reed 11-12-13
 Associate's Signature Date

[Signature] 11/12/13
 Supervisor/Manager's Signature Date

[Signature]
 Witness' Signature (if applicable)

11/12/13
 Date

Reduced TO VERBAL
 11/12/13

Airgas**COUNSELING STATEMENT**

Name: Rodger Haynes Date: 1/28/2014
Location: Cincinnati-Dayton Rd. Supervisor/Manager: Dave Luehrmann

X Written Warning

The above named associate is being counseled for the following reason(s):

Failure to follow Standard Operating Procedures (SOP) regarding the filling of cylinders and performing the proper pre-fill inspection process resulting in the following episodes that were uncovered recently:

1. In November 2013 we found out you filled a 4L200 Dewar with a 350 PRD installed. Filling a 4L200 with a 350 PRD is against SOP. Had the proper pre-fill inspection been performed this error would have been discovered and the Dewar would not have been filled. This error resulted in the operation having to scrap the Dewar which costing the operation about \$2500.00.
2. On January 24, 2014 another Dewar was found that you had filled on 1/16/14 involving a 4L100 with a 230 PRD installed. Had the proper pre-fill inspection had been performed this error would have been discovered and the Dewar would not have been filled. This error has resulted in the need to scrap the Dewar costing the operation about \$2,000.00.

Recommended corrective action:

It is critical, as well as a requirement of your position that you follow all Airgas Standard Operating Procedures. Should you have a question or encounter a problem you need to contact your supervisor or the appropriate management person for guidance.

In reviewing records relative to proper training, on 11/20/2013 during a safety meeting we reviewed SOP GEG 04 007, LCR over pressurization. Additionally, during a safety meeting on 12/11/13 we reviewed pre fill inspection requirements. You were in attendance at both safety meetings.

Consequences of not following recommended action: Further discipline up to termination

Rodger, you have been in this role for a significant period of time; these types of errors should not be occurring given your experience. Not only did you have a significant financial loss, we could have had a serious safety incident occur due to the wrong fitting in place on the Dewar.

As you know, Airgas Great Lakes has numerous procedures for ensuring accuracy in properly performing job tasks for success in one's position. It is a requirement of your job and your responsibility to follow Airgas' standard operating procedures as well as other

policies of the Company and to role model the behaviors that support our policies to ensure we provide customer service that meets, if not exceeds, customer expectations.

As a result, we expect immediate and consistent improvement in following and executing these policies, practices, and procedures. Further incidents of a similar nature or any other failure to carry out the accountabilities of your job, Airgas policies, or any other incident of poor work conduct will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency (ies) and what will be required of him/her to correct it (them). Associate understands that employment remains terminable at-will and further that if he/she fails to correct the noted deficiencies, or if any other deficiencies or misconduct occurs, employment may be terminated immediately.

_____ Associate Signature	_____ Date	_____ Manager's Signature	_____ Date
_____ Witness Signature		_____ Date	

Airgas**COUNSELING STATEMENT**

Name: Barry Perkins Date: 10/13/14
 Location: Cincinnati Dayton Rd Plant Supervisor/Manager: David Luehrmann

☒ Verbal Counseling

The above named associated in being counseled for the following reason(s):

SAFETY

On Thursday evening, October 9, 2014, the branch manager of the Cincinnati Mosteller Road Branch observed you not wearing your seat belt while operating a forklift as you were loading empty cylinders onto your truck.

Recommended correction action:

As an Airgas employee, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas.

You are expected to wear your seat belt and follow all other safety procedures while operating a forklift and performing any other duties related to your job.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

BjM 10/14/14
 Associate's Signature Date

David Luehrmann 10/14/14
 Supervisor/Manager's Signature Date

[Signature] 10/14/14
 Witness Signature (if applicable) Date

Airgas**COUNSELING STATEMENT**

Name: Bill Huff Date: 3/2/2015
 Location: Cincinnati-Dayton Road Supervisor/Manager: David Luehrmann/
 Todd Allender

Verbal Counseling

The above named associate is being counseled for the following reason(s):

Violation of CFR 49 395.3 (DOT Policy)

On 2/23, you clocked out at 8:02pm and clocked in at 6:59 am on 2/24. CFR 49 395.3 states that you cannot drive until off 10 consecutive hours.

Violating this policy can potentially lead to fines against, both, the driver and company.

Recommended corrective action:

As a professional driver, you are expected to know and adhere to this policy. You are not to clock in until you have been off for at least 10 consecutive hours.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Bill Huff 3-3-15 Associate's Signature Date
David Luehrmann 3/3/15 Supervisor/Manager's Signature Date
Bill Huff 3/3/15 Witness Signature (if applicable) Date

Airgas**COUNSELING STATEMENT**

Name: Robert Oestrieher Date: 3/18/2015
 Location: Cincinnati Dayton Rd Plant Supervisor/Manager: David Luehrmann

☒ Verbal Warning

The above named associated in being counseled for the following reason(s):
Work Rule Violation & Unsafe Act

At around 8:00am on Wednesday, 3/18/2015, Geoff Mangino, DM, and Mick Higgins, Branch Manager, saw you talking on your cell phone while operating a tow motor at the Mosteller Road Branch. Also, another employee advised you to not be on your phone while operating the tow motor, but you responded that you are a driver and could be on your phone.

This is a violation of Work Rule #23, which states you can only make personal calls during your break and lunch. You were last trained on our Work Rules on 1/21/2015.

This is also an unsafe practice. While operating any sort of heavy equipment, you should not be doing anything that can deter your attention away from your surroundings; this includes talking on your cell phone.

Recommended correction action:

As an Airgas employee, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas.

Going forward, you are not to use your cell phone while operating any sort of Airgas heavy equipment and to follow all safety procedures and Work Rules while operating a forklift and performing any other duties related to your job.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Associate Signature

Date

Manager Signature

Date

Witness' Signature (if applicable)

Date

TO DIT4 MARCH 20TH 2013. MR. CESTRICHEN OFFERS
OFF SO LETTER WAS GIVEN TO SAM BARRY PERKINS AT
7:15 PM.

Airgas

COUNSELING STATEMENT

Name:	Steve Rottinghouse	Date:	6.26.15
Location:	Cincinnati Dayton Rd Plant	Supervisor/Manager:	David Luehrmann

3 Day Suspension

The above named associated in being counseled for the following reason(s):

DISHONESTY & DELIBERATE VIOLATION of AIRGAS and DOT POLICY

On 6/22/2015, you clocked out at 3:24pm and then continued to complete your DOT paperwork while not on duty.

The Driver Training Manual specifically states the following:

- "On-duty, not driving - This is the time you spend loading, unloading, waiting to load, and unload, completing your paperwork, etc."
- "Airgas policy requires that your logbook is accurate and within the requirements of the law."
- "Airgas business units shall fully comply with the hours of service rules, and as professional drivers, we expect you to log your hours correctly. Discrepancies in logbooks are easily found during a review of payroll and other records."

Intentionally clocking out with the intent to complete your paperwork while off the clock is dishonest, as well as a severe violation of DOT and Airgas Policy.

Recommended correction action:

You will be suspended on the following days: 7/7, 7/8, 7/9.

Effective immediately are expecting to do the following:

- You are not to do work for Airgas if you are clocked out.
- You must make every reasonable effort to ensure that your log book is correct.
- You must check with a supervisor prior to clocking out at the end of the day.

Deliberately violating DOT and Airgas policies is unacceptable and will not be tolerated. This could have exposed you and Airgas to fines, penalties, and not adhering to Fair Labor Standard Acts (FLSA) Regulations.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

Airgas

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Refused to Sign

Associate Signature Date

Rebecca K. Kuchner 6/29/15

Manager Signature Date

[Signature]

Witness' Signature (if applicable)

6/29/15

Date

[Signature] 6/29/15
refuses 6/29/15

Airgas

COUNSELING STATEMENT

Name: Steve Rottinghouse Date: 8/5/2015
 Location: Cincinnati Dayton Rd Plant Supervisor/Manager: David Luehrmann

X Written Warning

The above named associated in being counseled for the following reason(s):

SAFETY – Securing cylinders

On Monday afternoon, 8/3/2015, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.

You have been trained on the proper way to secure cylinders while being transported. According to the DRIVER TRAINING MANUAL, "cylinders must be strapped, chained or secured to the vehicle so that they do not move or rattle."

Recommended correction action:

As an Airgas Driver, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas. For this reason, you are expected to properly secure cylinders when transporting them, as well as follow all other DOT and Safety procedures while performing any other duties related to your job.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Refuse To Sign
 Associate's Signature Date

David Luehrmann 8/6/15
 Supervisor/Manager's Signature Date

By [Signature] 8/6/15
 Witness Signature (if applicable) Date

[Signature] 8/6/15

Airgas**COUNSELING STATEMENT**

Name: Matt Kinkade Date: 9/21/2015
 Location: Cincinnati-Dayton Road Supervisor/Manager: David Luehrmann

Verbal Counseling

The above named associate is being counseled for the following reason(s):

Violation of CFR 49 395.3 (DOT Policy)

On 9/14, you clocked out at 7:34pm and clocked in at 5:33am on 9/15. CFR 49 395.3 states that you cannot drive until off 10 consecutive hours.

Violating this policy can potentially lead to fines against, both, the driver and company. Also, it forced me to pull you off the road for the day, limiting our delivery capabilities and ability to service our customers.

Recommended corrective action:

As a professional driver, you are expected to know and adhere to this policy. You are not to clock in until you have been off for at least 10 consecutive hours.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Matt Kinkade 9-21-15 David Luehrmann 9/21/15
 Associate's Signature Date Supervisor/Manager's Signature Date
[Signature] 9-21-15
 Witness Signature (if applicable) Date

Airgas.**COUNSELING STATEMENT**

Name: Bill Huff Date: 1/25/2016
Location: Cincinnati-Dayton Road Supervisor/Manager: David Luehrmann/
Todd Allender

Written Counseling

The above named associate is being counseled for the following reason(s):

Vehicle Accident - preventable

On 1/20/2016, you hit the side of Coyer Truckings building with the side of the truck. This caused damage to the building.

Recommended corrective action:

As a professional driver, you are expected to be aware of your surroundings at all time. You are expected to operate your vehicle safely and follow all Airgas SOP and Safety Procedures, eliminating any preventable accidents from happening.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Bill Huff 1-26-16
Associate's Signature Date

David Luehrmann 1/26/16
Supervisor/Manager's Signature Date

John Bowman 1-26-16
Witness' Signature (if applicable) Date

Airgas**DRIVER DEMONSTRATION REPORT***Ken's*

DRIVER NAME <i>Steve Rottinkhouse</i>		WEATHER/ROAD CONDITIONS <i>Reinforced 10th</i>		LOCATION <i>Lin-Dayton RD.</i>		OBSERVED BY <i>Ken's</i>
PHYSICAL CARD EXPIRATION <i>8-7-2016</i>		VEHICLE NUMBER <i>400988-501795</i>		TYPE OF DELIVERY UNIT <i>Tractor-Trailer 80,000 GVL</i>		
CDL EXPIRATION <i>6-22-2016</i>	ENDORSEMENTS <i>MX</i>	CLASS <i>A</i>	STATE <i>OH</i>	OBSERVATION START/STOP TIME <i>11:00 AM / 4:45 AM</i>		

DRIVING OBSERVATION

	YES	NO		YES	NO
Load is properly secured	<input checked="" type="checkbox"/>		Driver keeps right	<input checked="" type="checkbox"/>	
Straps are in good condition, not frayed	<input checked="" type="checkbox"/>		Driver stops at all railroad tracks	<input checked="" type="checkbox"/>	
Driver sets mirrors properly	<input checked="" type="checkbox"/>		Driver follows at safe distance	<input checked="" type="checkbox"/>	
Driver wears seatbelt	<input checked="" type="checkbox"/>		Driver enters exit ramp or intersection at safe speeds	<input checked="" type="checkbox"/>	
Driver yields to other traffic	<input checked="" type="checkbox"/>		Driver performs driving tasks in a safe, professional manner (if no, detail below)	<input checked="" type="checkbox"/>	
Driver passes legally	<input checked="" type="checkbox"/>		Check (✓) each action observed (mark comments at bottom of page)		
Driver signals properly	<input checked="" type="checkbox"/>		General handling <input checked="" type="checkbox"/> Right turn <input checked="" type="checkbox"/> Stopping <input checked="" type="checkbox"/>		
Driver drives within posted speeds	<input checked="" type="checkbox"/>		Forward driving <input checked="" type="checkbox"/> Left turn <input checked="" type="checkbox"/> Shifting <input checked="" type="checkbox"/> <i>N/A</i>		

DELIVERY OBSERVATION

Driver checks area before backing (GOAL)	<i>See attached</i>	Uses proper cylinder/VGL cart	<input checked="" type="checkbox"/>	<i>N/A</i>
Properly enters/exits cab (3 point stance)	<input checked="" type="checkbox"/>	Properly secure each group of cylinders	<input checked="" type="checkbox"/>	
Driver checks vehicle tires when parked	<input checked="" type="checkbox"/>	Properly secures hardgoods on truck		<i>N/A</i>
Driver wears proper PPE equipment		Safety chains/bar used on lift gate		<i>N/A</i>
Metatarsal safety shoes	<input checked="" type="checkbox"/>	Uses only approved dock plates		<i>N/A</i>
Safety glasses	<input checked="" type="checkbox"/>	Driver chocks wheels, uses cones	<input checked="" type="checkbox"/>	
Gloves	<input checked="" type="checkbox"/>	Customer delivery site is safe with adequate access	<input checked="" type="checkbox"/>	
Face shield (liquid transfill)		Driver observes all procedures in handling & movement of banks	<input checked="" type="checkbox"/>	
Driver shuts off engine and secures vehicle	<input checked="" type="checkbox"/>	Truck reconciliation properly performed	<input checked="" type="checkbox"/>	
Driver Looks for building overhangs, trees, etc.	<input checked="" type="checkbox"/>			

PAPERWORK & PLACARDS

Proper placards displayed for load	<input checked="" type="checkbox"/>	Driver logs - current to last change of duty (if applicable)		<i>N/A</i>
Driver has current 100 mile log exemption		Driver is operating within hours of service regulations & 14 hour rule (if applicable)	<input checked="" type="checkbox"/>	
Hazardous Material Shipping Paper updated - correspond to actual load	<input checked="" type="checkbox"/>	Driver has load verified pre & post trip	<input checked="" type="checkbox"/>	
Vehicle pre-trip inspection complete	<input checked="" type="checkbox"/>	Commentary Drive (did they communicate what they saw and their actions?)	<input checked="" type="checkbox"/>	
Trip report is current	<input checked="" type="checkbox"/>			
Smith training completed	<input checked="" type="checkbox"/>			

Delivery Unit Checklist

Emergency Response guidebook	<input checked="" type="checkbox"/>	Special permits book	<input checked="" type="checkbox"/>
Insurance card	<input checked="" type="checkbox"/>	Uniform Hazmat	<input checked="" type="checkbox"/>
Vehicle registration	<input checked="" type="checkbox"/>	HM Registration	<input checked="" type="checkbox"/>
IFTA Registration	<input checked="" type="checkbox"/>	Accident kit	<input checked="" type="checkbox"/>

Comments: *Steve & I reviewed this document tonight. He has a good idea of all policy's + procedures and follows them.*

DRIVERS SIGNATURE <i>[Signature]</i>	DATE <i>11-9-2015</i>	OBSERVERS SIGNATURE <i>[Signature]</i>
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Airgas

Certificate of Completion

This certificate is presented to

Steven Rottinghouse

for successfully completing

Airgas Driver Training Manual Curriculum

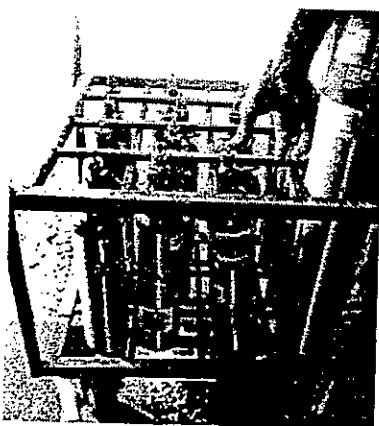
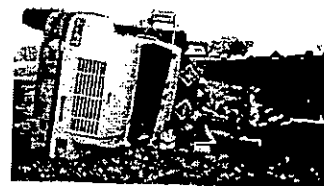
12/17/2014

Instructor: Airgas USA, LLC
31 N. Peoria
Tulsa, OK 74120

The Airgas Driver Training Manual Curriculum Elearning course is available on the Airgas Intranet site. This certification is in compliance with the requirements found in 49 CFR 172.704. This document certifies that the above named hazmat employee has been trained and tested, as required by this subpart.

Airgas
SAFECOR**DRIVER TRAINING MANUAL****Section: Loading and Securing Cylinders**

The DOT regulates the way we transport cylinders and secure them to our vehicle. They require that all cylinders be secured to the vehicle and to each other. This means that cylinders must be strapped, chained or secured to the vehicle so that they do not move or rattle. Small cylinders must be secured as well. You can not transport cylinders if they have the ability to roll around, such as in a box or cage. Special care must be taken when transporting small cylinders. Please work with your supervisor to correct any cylinder transportation problems.



This photo is a recent example of improper/illegal use of an "E" Cart. The cart is designed to transport E size cylinders but someone placed smaller cylinders in the cart and since the smaller cylinders are too small (in diameter and height) for the E cart, the driver was cited and placed Out of Service during a roadside inspection.

The cylinder straps, chains or whatever means you use to secure your cylinders must be rated for the load they will restrain. It may be necessary to use two straps, chains, etc. to secure the cylinders. The basic rule is the strap or securement device must have a weight rating of one-half the weight of the item/load you want to secure. A knot or defect will reduce the weight rating of the strap, which will result in being out of compliance. Straps and securement devices must be maintained in good working order. Any frayed, cut, damaged or broken equipment should not be used. Your vehicle should be equipped with at least two spare straps, chains, etc. Contact your supervisor for a replacement.

Newer Airgas pallet vehicles are equipped with a strap to secure the pallet to the truck or trailer. If the vehicle you operate is equipped with this strap, it must be used and maintained in the same good working condition as the cylinder securement straps.

Prepared by: <i>John Anderson</i>	Revision Date: December 1, 2014	Revision Number: 9
Approved by: <i>James H. Gentry</i>	Manual Number: 0013	Page 18 of 112

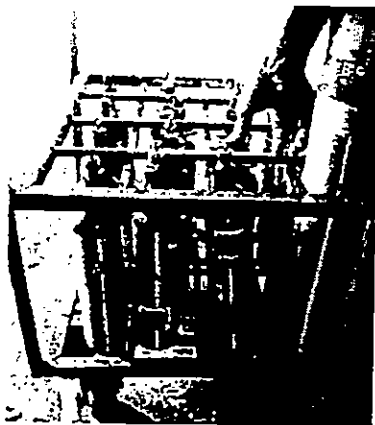
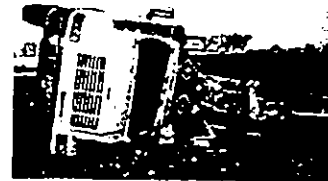
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Airgas
SAFECOR

DRIVER TRAINING MANUAL

Section: Loading and Securing Cylinders

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This photo is a recent example of improper/illegal use of an "E" Cart. The cart is designed to transport E size cylinders but someone placed smaller cylinders in the cart and since the smaller cylinders are too small (in diameter and height) for the E cart, the driver was cited and placed Out of Service during a roadside inspection.

The cylinder straps, chains or whatever means you use to secure your cylinders must be rated for the load they will restrain. It may be necessary to use two straps, chains, etc. to secure the cylinders. The basic rule is the strap or securement device must have a weight rating of one-half the weight of the item/load you want to secure. A knot or defect will reduce the weight rating of the strap, which will result in being out of compliance. Straps and securement devices must be maintained in good working order. Any frayed, cut, damaged or broken equipment should not be used. Your vehicle should be equipped with at least two spare straps, chains, etc. Contact your supervisor for a replacement.

Newer Airgas pallet vehicles are equipped with a strap to secure the pallet to the truck or trailer. If the vehicle you operate is equipped with this strap, it must be used and maintained in the same good working condition as the cylinder securement straps.

Prepared by: <i>John Anderson</i>	Revision Date: December 1, 2014	Revision Number: 9
Approved by: <i>James M. Gentry</i>	Manual Number: 0013	Page 18 of 112

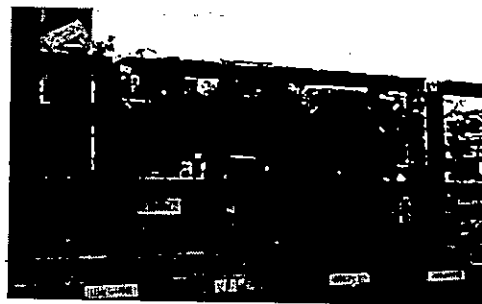
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Airgas

SAFECOR

DRIVER TRAINING MANUAL**Section: Loading and Securing Cylinders**

This photo shows an example of cylinders that were improperly secured using plastic wrap. Note that at least one of the cylinders is about to slip through, where it would fall to the roadway.



Load securement also includes items such as dry ice totes, welders, boxes of welding rod, etc. Because of the size of the dry ice tote, welder, etc. people sometimes make the mistake of believing that it does not need a securement device. 49 CFR §393.102(b) requires that all cargo be properly secured. When transporting anything on the vehicle, it must be secured.



Make sure you remember to secure all items in cab, such as reflective triangles, fire extinguisher, first-aid kit, etc.

Make sure you remember to secure your cylinder cart to the vehicle. The rules for securement apply to anything transported on your vehicle, such as a spare tire, cones used for backing, chocks, etc. Also for pallet trucks and trailers ensure that any loose gravel, rocks, etc. laying on the bed of the vehicle is removed before leaving the yard. Gravel, rocks, etc. that fall from the bed of the vehicle going down the highway can be cited for failure to secure or in some cases even littering.

The DOT has updated the securement requirements for other types of cargo, such as bulk tanks, vaporizers, etc. If your business unit transports these items, contact your Safety Director to ensure compliance with the new securement regulations.

Both high-pressure cylinders and liquid cylinders are to be moved with an approved cart. The practice of rolling cylinders has been proven to cause injury and damage, both to personnel, docks and other equipment. Airgas policy is to use cylinder carts where practical. This includes route trucks and non-palletized delivery vehicles.

Prepared by: <i>John Anderson</i>	Revision Date: December 1, 2014	Revision Number: 9
Approved by: <i>James H. Gentry</i>	Manual Number: 0013	Page 19 of 112

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DRIVER TRAINING MANUAL

Section: Loading and Securing Cylinders

Cylinder cradles, sometimes called "6-packs" or "12-packs" are especially dangerous and require special handling. It is ideal that cradles be palletized and moved by forklift or specifically equipped and moved by use of a hoist. Where a given situation cannot justify the use of a forklift or hoist, cradles shall be moved in accordance with the following provisions:

- Cradles containing more than 12 cylinders shall be moved only by use of a forklift or hoist.
- Where unloading or loading vehicles, ensure the beds are properly located at loading docks, wheels are chocked and parking brakes engaged.
- Give constant attention to cradles during movement, especially 6-packs, because they are top-heavy and tend to tip on uneven surfaces.
- Give constant attention to the surface upon which the cradle is being moved. Rough and uneven surfaces require greater effort and increase the risk of back injury, body impact and overexertion.
- Encourage customers to move 12-packs by forklift or hoist. Where a customer will not agree to the use of a forklift or hoist they shall be encouraged to consider other supply modes that are less hazardous to handle. Examples are liquid cylinders or bulk liquid tanks. Where it is necessary that high-pressure sources be provided then one might look to cylinder banks, fixed tubes or tube trailers.
- Clustered cylinders shall be properly braced, secured together and not leaning.
- Liftgates used to lower cradles must be properly rated for the load capacity, and shall be equipped with protective railing or chains. Railings and chains shall be adequately designed to prevent cradles from falling.
- Never stand below the liftgate when cradles are being lowered.

Prepared by: <i>John Anderson</i>	Revision Date: December 1, 2014	Revision Number: 9
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Location: N026 Cincinnati Dayton pk.

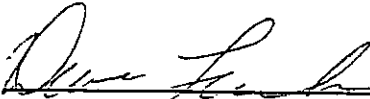
Safety Meeting Form

Topic descriptions: AGL Pallets & Straps and Kemper Load Securement, strap condition.

Visual aids or references used to conduct the training: Airgas Great Lakes Power Point Presentations, AGL Pallets and Straps and Kemper Power Point "Kemper Load Securement, strap condition"(Out of Service Conditions).

Remarks:

Meeting conducted by:


(Signature)

Date: 9/3/2014

Business Address of Trainer: 10031 Cincinnati Dayton pk.

Cincinnati Ohio 45069

Attendees

[illegible]

(Use backside for additional printed names and signatures or initials.

Pallet Handling

Strapping/unstrapping and movement of pallets

Pallet Concerns

Why Focus on Pallet Handling?

- Frequently performed task, risk of injury
- Ensure we have secure loads on vehicles

General Hazards Associated with Pallets

- Personal injuries
- Loose cylinders falling
- Unsecured loads on vehicles during transportation

Pallet Handling

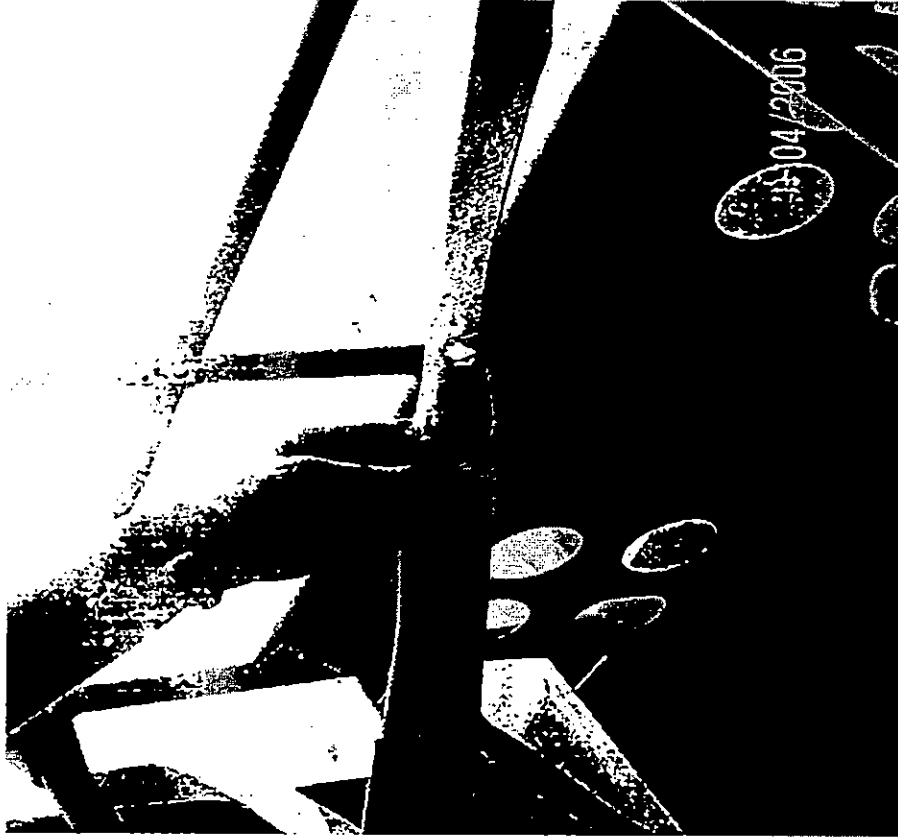
- **Three Primary Areas of Concern**
 - Condition of straps and ratchets
 - Condition of pallet
 - Procedures for strapping and loading

Condition of Straps and Pallets

- All Employees are responsible for inspection AND replacement of Pallet Straps
- ALL AGL facilities handling distribution (with pallet vehicles) MUST have an inventory of straps and ratchets for replacement
- Straps and Pallets MUST be inspected as part of the pre-trip/post trip inspection
- Straps and Pallets MUST be inspected by loaders/drivers PRIOR to using (loading) the pallet

Pallet Strap Inspection

- Physical Strap Inspection
 - Free moving ratchet mechanism
 - No bent handles or other defects
 - No frays, tears or cuts on straps
 - Every pallet has 2 straps
 - REPLACE AS NECESSARY (all Locations)



Physical Pallet Inspection

- Level flooring: No bowing
- Back bar/rails are in place and welds are in tact
 - Missing back bars may allow pallet to shift on vehicle and topple over, especially with heavy loads such as cradles
- Fork slots are clear and bottom safety bracket is in tact
- Two straps

Procedures for strapping / Loading

- 2 Items to Consider
 - Body Positioning
 - Physical loading and unloading

Body Positioning

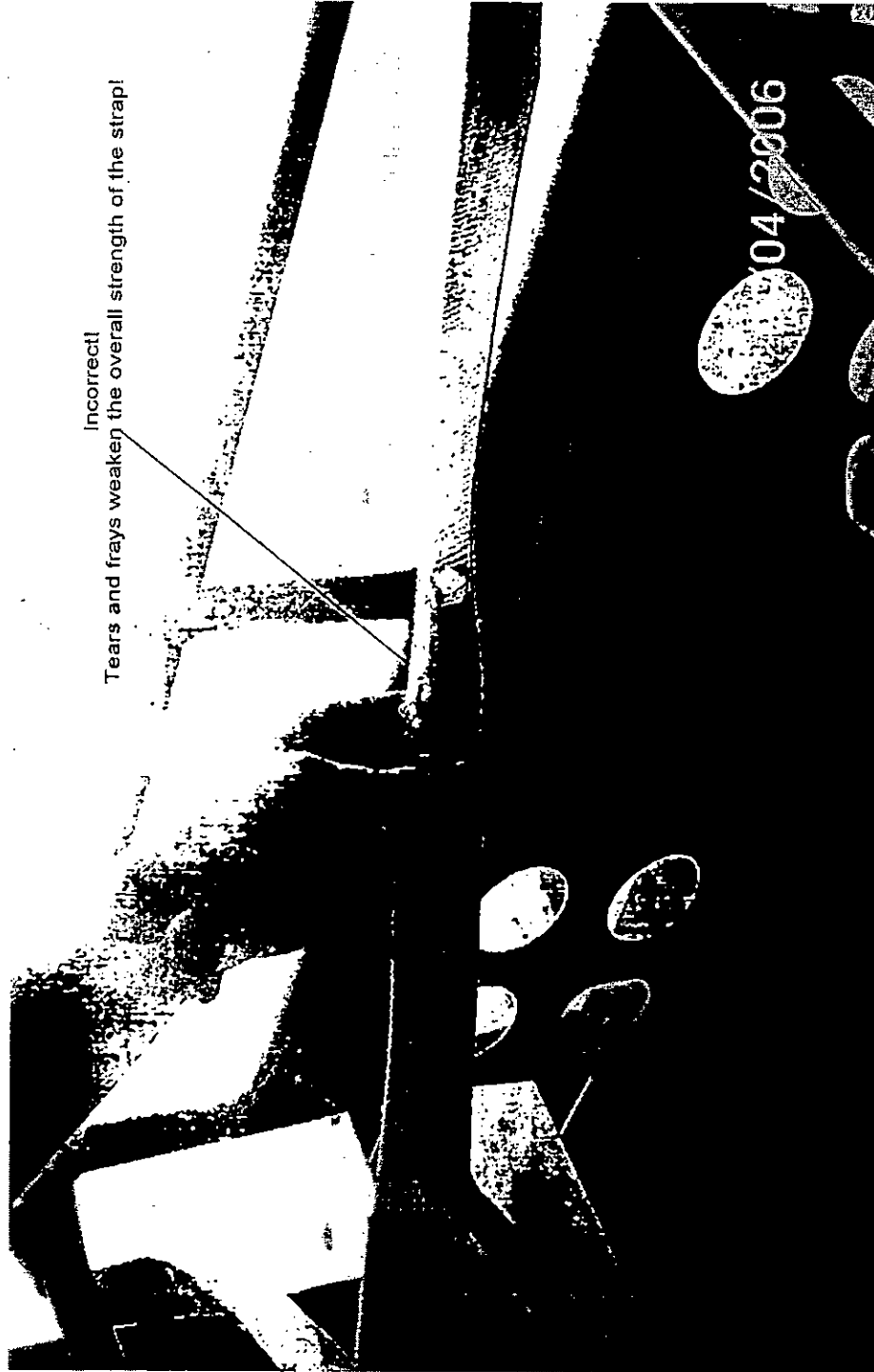
- Injury prevention starts with proper body positioning
 - Move away from docks, trailer/truck openings
 - Avoid congested areas (clear area if needed prior to loosening or tightening strap)



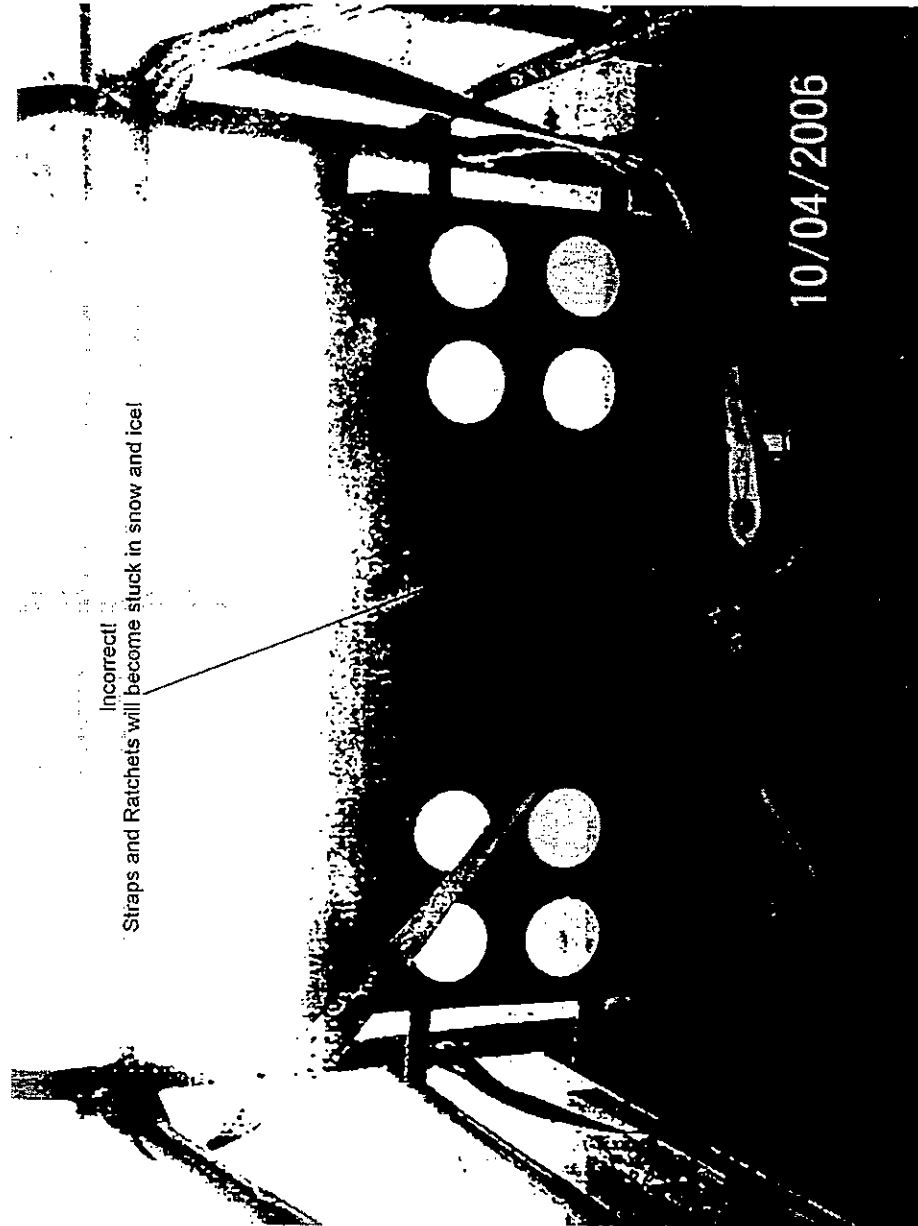
Physical Unloading/Loading

- **Use proper cylinder nesting techniques**
- Use the back brace when strapping small quantities of cylinders to secure the load
- Do not leave unstrapped pallets unattended
- All pallets **MUST** be strapped before ANY pallet is pulled from or placed on a truck/trailer
- If cylinder falls, get out of the way: **LET IT FALL**

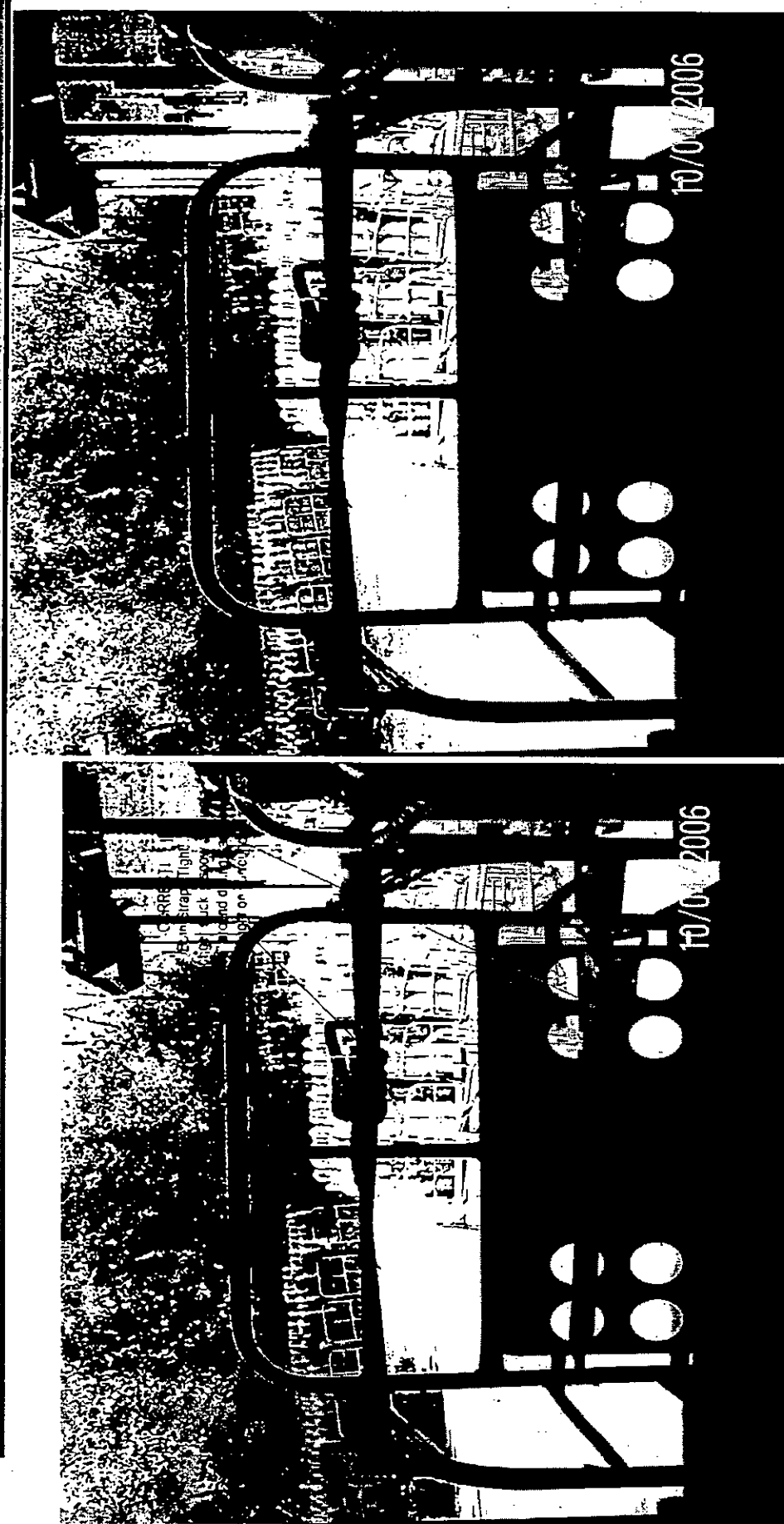
Look for Frayed Straps



Incorrect! Do not leave straps on floor of pallet



Correct! Keep Straps/Ratchets off the pallet floor



Where to get Straps/Ratchets?

- Kemper Corporation (vendor 2781)
 - 877-447-8727
- Airgas Style Pallets
 - PN#Q00LO0A72 (ratchet end)
 - Q29LO00A48-0002 (hook end)
- BOC Style Pallets
 - Q99LO00B72-0002 (ratchet end)
 - Q29LO00B38-0002 (hook end)

Airgas

Certificate of Completion

This certificate is presented to

Steven Rottinghouse

for successfully completing

Airgas Driver Training Manual Curriculum

12/17/2014

Instructor: Airgas USA, LLC
31 N. Peoria
Tulsa, OK 74120

The Airgas Driver Training Manual Curriculum Elearning course is available on the Airgas Intranet site. This certification is in compliance with the requirements found in 49 CFR 172.704. This document certifies that the above named hazmat employee has been trained and tested, as required by this subpart.

Airgas

Certificate of Completion

This certificate is presented to

Steven Rottinghouse

for successfully completing

Cryogenic Liquid Cylinder Training

10/21/2015

Location: N026 Cincinnati

Safety Meeting Form

Topic descriptions: CSA (Compliance, Safety and Accountability)

Visual aids or references used to conduct the training: AGL Power Point
Presentation "Airgas CSA Training".

Remarks: Issued the J.J Keller Drivers Handbook

Meeting conducted by:


(Signature)

Date:

6/11/14

Business Address of Trainer: 10031 Cincinnati Dayton pk.

Cincinnati Ohio 45241

Attendees

(Use backside for additional printed names and signatures or initials.

Airgas®



CSA

Compliance, Safety and Accountability

CSA

What is CSA?

- Improves the efficiency and effectiveness of FMCSA by:
- Evaluates safety of carriers and CMV drivers based on unsafe behaviors that lead to crashes
- Weights time and severity of violations based on relation to crash risk
- Uses crash records and all safety-based violations found at roadside
- Taking rapid action against those with apparent safety problems, to get them to improve
- Calculates safety performance based on seven Behavior Analysis and Safety Improvement Categories (BASICs)

CSA

How Does the CSA Driver Enforcement Process Work?

The driver enforcement process provides FMCSA with the tools to identify problem drivers and to verify and address the issues. The Safety Measurement System (SMS) includes a tool, called the Driver SMS, which enables Safety Investigators (SIs) to evaluate roadside performance of drivers across employers over a 3-year period. Using this system, SIs can identify drivers with overall poor safety histories who work for carriers that have been identified as requiring a CSA investigation. If the investigation results verify the driver violation(s), **FMCSA takes an enforcement action against that driver**, such as a Notice of Violation or a Notice of Claim.

CSA

Driver Safety Enforcement Approach

Under CSA, driver enforcement occurs as part of motor carrier investigations and focuses on driver enforcement for serious rule violations, such as:

- Driving while disqualified
- Driving without a valid commercial driver's license
- Making a false entry on a medical certificate
- Committing numerous Hours-of-Service violations

Enforcement action will be taken directly against the driver for these violations. If the carrier is also determined to be a responsible party, it may also receive enforcement action.

It is important to clarify that CSA does not rate individual CMV drivers.

CSA

Making Carriers Aware of Driver Safety Performance (PSP)

The Pre-Employment Screening Program (PSP) is an FMCSA program mandated by Congress that is designed to assist the motor carrier industry in assessing individual CMV drivers' safety violation and crash history as a pre-employment condition. The program is voluntary and is not part of CSA. Motor carriers may request a driver's information for the purpose of pre-employment screening only. The driver must provide written consent. Individual drivers may request their own driver information record at any time. The electronic profiles contain three years of inspection data and five years of crash data. However, the service for both drivers and carriers database does not include conviction data. There is a fee for this service for both drivers and carriers.

CSA

The Seven Basics are:

1. Unsafe Driving
2. Fatigued Driving
3. Driver Fitness
4. Controlled Substances (Drug and Alcohol)
5. Vehicle Maintenance
6. Cargo Related (Load Securement)
7. Crash Indicator

CSA

Know the BASICS:

Unsafe Driving

1. Speeding
2. Reckless Driving (improper lane change, following to close)
3. Texting while Driving a CMV
4. Inattention
5. Smoking within 25ft. of a Hazmat Vehicle
6. Failing to use seat belt

CSA

Know the Basic:

Fatigued Driving

1. Failing to complete or retain log (retain previous 7 days)
2. Log-Book Violations(failing to include ALL required items on the log)
3. Operating a CMV while ill-fatigued

CSA

Know the Basics:

Driver Fitness

1. Operating a CMV without a Valid License (proper endorsements)
2. Current Medical Card
3. Driving a CMV while Disqualified (failing to notify your employer of convictions)
4. Failing to undergo training as a hazmat employee(hm126f)
5. Unqualified driver

CSA

Know the Basics:

Controlled Substances and Alcohol

1. Possession or Use of Drugs
2. Possession use or being under the influence of Alcohol(with-in 4 hours prior to duty)

CSA

Know the Basics:

Vehicle Maintenance

1. Defective brakes, lights,
2. Inadequate conspicuity treatments (reflective tape) or other mechanical components (springs or chaffing of hoses)
3. Failing to inspect the CMV or prepare inspection report and failing to make repairs

CSA

Know the Basics:

Cargo – Related

1. Failing to properly secure the load.....
2. Insufficient or DAMAGED tie downs (knotted, frayed straps)
3. Failing to have proper Hazmat documentation (hazmat shipping paper, 2008 ERG book, federal and state hazard registrations)

CSA

Know the Basics:

Crash Indicator

1. Reportable Crashes – Fatalities
2. ALL Crashes preventable or non-preventable will be counted against the company and driver.
3. Injuries requiring immediate treatment away from the scene or vehicles being towed from the scene.

b2

CSA *Roadside Inspections:*

1. **A violation** is an infringement of a law or rule and stays with the company for 24 months and the driver for 36 months.
2. A warning is just that: A written warning that appears on a roadside inspection report **will** affect our CSA score and may appear on the drivers record as well
3. Keep in mind that **all safety-related violations count**

DRIVER'S RECEIPT	
The Basics: Crash Data Measurement on the BASICS The BASICS: Unsafe Driving The BASICS: Drugs & Alcohol The BASICS: Focused Driving The BASICS: Driver Fitness The BASICS: Vehicle Maintenance	The Basics: Seat Belts The BASICS: Crash Avoidance Roadside Inspection Interventions UTA Access Frequently Asked Questions CSA Myths
EMPLOYEE'S NAME (PLEASE PRINT)	
EMPLOYEE'S SIGNATURE	
COMPANY	
SUPERVISOR'S SIGNATURE	
NOTE: This receipt may be read and signed by the employee, countersigned by a company supervisor and dated.	

CSA Questions?

Call: Driver Trainers

Bob Samerigo 216-854-6240

Duane Peterson 231-944-9049

or

Safety Department:

Arthur Langston

CSA

What's Wrong with this Picture?



42

Airgas

Certificate of Completion

This certificate is presented to

Steven Rottinghouse

for successfully completing

Airgas HM126f Training Curriculum

10/22/2014

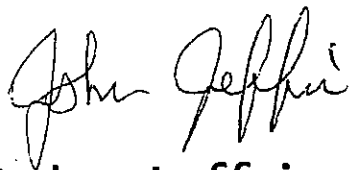
Instructor: Airgas USA, LLC
31 N. Peoria
Tulsa, OK 74120

The Airgas HM126f Training Curriculum Elearning course is available on the Airgas Intranet site. This certification is in compliance with the requirements found in 49 CFR 172.704. This document certifies that the above named hazmat employee has been trained and tested, as required by this subpart.

VERBAL WARNING

John Jeffries backing accident

May 10th, 2013. After further investigation it was deemed to be preventable. This is a verbal warning.



John Jeffries



Dave Luehrmann

Cc: Barry Perkins

G.S. Ex 7

COUNSELING STATEMENT

Name: Steve Rottinghouse Date: 8/5/2015
Location: Cincinnati Dayton Rd Plant Supervisor/Manager: David Luehrmann

☒ Written Warning

The above named associated in being counseled for the following reason(s):

SAFETY – Securing cylinders

On Monday afternoon, 8/3/2015, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.

You have been trained on the proper way to secure cylinders while being transported. According to the DRIVER TRAINING MANUAL, "cylinders must be strapped, chained or secured to the vehicle so that they do not move or rattle."

Recommended correction action:

As an Airgas Driver, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas. For this reason, you are expected to properly secure cylinders when transporting them, as well as follow all other DOT and Safety procedures while performing any other duties related to your job.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers and the general public. It is your responsibility to follow Airgas' standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

The associate's signature on this form indicates that the associate has been advised of his/her performance deficiency(ies) and what will be required of him/her to correct it (them).

Refuse To Sign
Associate's Signature Date

David Luehrmann 8/6/15
Supervisor/Manager's Signature Date

By [Signature]
Witness Signature (if applicable)

8/6/15
Date

[Signature] 8/6/15

Joint Ex. 1



Clyde Froslear

From: Clyde Froslear
Sent: Tuesday, August 04, 2015 12:56 PM
To: Mark Macbride
Subject: RE: Load secure the

Call me when you have time. I want you to zoom in on how the cylinders were strapped down.

Clyde A. Froslear
Operations Manager
Airgas Great Lakes
10031 Cincinnati Dayton Road
Cincinnati, Ohio 45241
Office (513) 842-7183
Cell (513) 464-6141

-----Original Message-----

From: Mark Macbride
Sent: Tuesday, August 04, 2015 8:40 AM
To: Clyde Froslear
Subject: Re: Load secure the

In the driver trainer manual

Sent from my iPhone

> On Aug 4, 2015, at 8:33 AM, Clyde Froslear <clyde.froslear@airgas.com> wrote:
>
> Where would I find the strongest language about load securement that drivers are trained to?

>
>
>
> Clyde A. Froslear
> Operations Manager
> Airgas Great Lakes
> 10031 Cincinnati Dayton Road
> Cincinnati, Ohio 45241
> Office (513) 842-7183
> Cell (513) 464-6141

> -----Original Message-----

> From: Mark Macbride
> Sent: Tuesday, August 04, 2015 8:13 AM
> To: Clyde Froslear
> Subject: Re: Load secure the

>
> Unacceptable

>
> Sent from my iPhone
>
>> On Aug 4, 2015, at 7:59 AM, Clyde Froslear <clyde.froslear@airgas.com> wrote:
>>
>> This is the way it was when he pulled in after his run.
>>
>>
>>
>> Clyde A. Froslear
>> Operations Manager
>> Airgas Great Lakes
>> 10031 Cincinnati Dayton Road
>> Cincinnati, Ohio 45241
>> Office (513) 842-7183
>> Cell (513) 464-6141
>>
>>
>> -----Original Message-----
>> From: Mark Macbride
>> Sent: Tuesday, August 04, 2015 7:58 AM
>> To: Clyde Froslear
>> Subject: Re: Load secure the
>>
>> Did it get fixed before leaving
>>
>> Sent from my iPhone
>>
>>> On Aug 4, 2015, at 7:56 AM, Clyde Froslear <clyde.froslear@airgas.com> wrote:
>>>
>>> I saw it when he pulled in the yard.
>>>
>>>
>>>
>>> Clyde A. Froslear
>>> Operations Manager
>>> Airgas Great Lakes
>>> 10031 Cincinnati Dayton Road
>>> Cincinnati, Ohio 45241
>>> Office (513) 842-7183
>>> Cell (513) 464-6141
>>>
>>>
>>> -----Original Message-----
>>> From: Mark Macbride
>>> Sent: Tuesday, August 04, 2015 7:56 AM
>>> To: Clyde Froslear
>>> Subject: Re: Load secure the
>>>
>>> Not good, did the driver catch it before leaving
>>>
>>> Sent from my iPhone
>>>
>>>> On Aug 4, 2015, at 7:54 AM, Clyde Froslear <clyde.froslear@airgas.com> wrote:
>>>>
>>>> CinDay

>>>>

>>>> Clyde A. Froslear

>>>> Operations Manager

>>>> Airgas Great Lakes

>>>> 10031 Cincinnati Dayton Road

>>>> Cincinnati, Ohio 45241

>>>> Office (513) 842-7183

>>>> Cell (513) 464-6141

>>>>

>>>> -----Original Message-----

>>>> From: Mark Macbride

>>>> Sent: Tuesday, August 04, 2015 7:54 AM

>>>> To: Clyde Froslear

>>>> Subject: Re: Load secure the

>>>>

>>>> No with the cylinders being off set we would be hit for insecure load just by how it looks. Where is this truck

>>>>

>>>> Sent from my iPhone

>>>>

>>>>> On Aug 4, 2015, at 7:04 AM, Clyde Froslear <clyde.froslear@airgas.com> wrote:

>>>>>

>>>>>

>>>>> What do you think about this? Look good to you?

>>>>>

>>>>>

>>>>> <IMG_0279.JPG>

>>>>>

>>>>>

>>>>>

>>>>> Sent from my iPhone

AGREEMENT

Between

TRUCK DRIVERS, CHAUFFEURS AND HELPERS, Public
Employees, Construction Division, Airlines -
Greater
Cincinnati / Northern Kentucky Airport and
Miscellaneous Jurisdiction, Greater Cincinnati,
Ohio
LOCAL UNION NO. 100

An affiliate of the
International Brotherhood of Teamsters

And

Airgas USA, LLC

12/1/12 - 11/30/15

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AGREEMENT

THIS AGREEMENT is entered into by and between the Truck Drivers, Chauffeurs and Helpers, Public Employees, Construction Division, Airlines - Greater Cincinnati/Northern Kentucky Airport and Miscellaneous Jurisdiction, Greater Cincinnati, Ohio Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, hereinafter known as the Union, and Airgas USA, LLC, hereinafter known as the Employer.

WITNESSETH:

ARTICLE 1. SCOPE AND COVERAGE OF AGREEMENT.

This Agreement shall cover all truck drivers and plant operations employees, including any employees who are engaged in driving trucks or assisting in the operation of a truck, at the Employer's facility at 10031 Cincinnati Dayton Road, Cincinnati, Ohio, regardless of whether the individuals are employed directly or indirectly by Airgas USA, LLC or by a wholly owned or controlled subsidiary company of Airgas USA, LLC.

All products processed at the Cincinnati Dayton Rd. location for delivery in the Greater Cincinnati area shall be delivered by members of the bargaining unit covered by this Agreement, except in case of emergency.

Subcontracting of Bargaining Unit Work is prohibited except for the purpose of meeting immediate customer needs. All deliveries which originate from the Bargaining Unit facilities will be delivered by Bargaining Unit Employees except in the case of emergency and for the purpose of meeting immediate customer needs.

In the event the Employer moves a substantial part or all of the operations from the Cincinnati Dayton Road facility to another location that is within 35 miles of the existing facility, this Agreement will continue to cover the drivers and plant operations employees at the relocated operation."

ARTICLE 2. EMPLOYMENT CONDITIONS.

It is agreed that employees covered by this Agreement shall, as a condition of employment, become members of the Union no later than the thirty-first day following the beginning of employment or the thirty-first day following the effective date of this Agreement, whichever is later, and thereafter shall maintain

membership. Employees who fail to pay the uniform dues and initiation fees of the Union shall be dismissed. New employees may be employed on a sixty (60) working days trial basis and may be discharged at the sole discretion of the Employer during said sixty (60) working days trial period.

When the Employer needs additional employees, it shall give the Local Union opportunity with other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.

The Union will indemnify the Employer and hold it harmless from any liability arising from the operation of this Article or of Article 12 (Check-Off) in attempting in good faith to carry out the provisions of these two Articles. The Employer shall be entitled to rely upon oral assurances or representations from the Union, but may also require written confirmation.

The Employer agrees to cooperate to notify the Union of the name of every new employee hired.

ARTICLE 3. HOURS OF WORK.

The standard work week for all employees shall be forty (40) hours.

The Company will guarantee a forty (40) hour work week for the top 90% of the regular full time driver/plant operations employees (fractions eliminated). This guarantee will not apply due to circumstances which are beyond the Company's control. All paid work days (i.e., vacations, holidays) count toward this guarantee. Failure to report to work on an employee's scheduled work day eliminates the guarantee for that week.

The senior employee shall receive the hours listed above. In the event that the Employer is unable to provide the above hours of work per week for the employees, then the youngest employee in point of seniority shall either work the shorter hours or shall be laid off.

The regular work week shall be Monday through Saturday. Time worked on Sundays and holidays shall be paid in addition to the guarantee. All time in excess of eight (8) hours per day or forty (40) hours per week shall be paid for at the rate of time and one-half. The eight (8) hours' holiday pay will count toward satisfaction of the guarantee. All work performed on Sundays and holidays shall be paid for at the rate of double time.

The standard work week shall be forty (40) hours per week and the standard work day shall be eight (8) consecutive hours per day, exclusive of the meal period. The employees' work week shall

commence at 12:01 a.m. Monday and an employee may be scheduled or directed to start his regular work week at any time on Monday or Tuesday of each week.

The legal holidays referred to herein are the following:

New Year's Day	Thanksgiving Day
Memorial Day	Day after Thanksgiving
4th of July	Labor Day
Christmas Day	
(4) Personal Days	

If one of the scheduled holidays listed above falls on a Saturday, the holiday will be scheduled for the preceding Friday; If one of the scheduled holidays listed above falls on a Sunday, the holiday will be scheduled for the following Monday.

In addition to the holidays listed above, two (2) floating holidays are provided each year. Floating holidays are designated by management each year, as either additional scheduled holidays (added to holiday schedule above) or if floating holidays are not determined as scheduled holiday(s), the associate will be able to schedule the floating holidays as time off during the year with management approval.

Each employee on the active payroll of the Employer on these days will be paid eight (8) hours' pay at his straight time rate as holiday pay. All employees who work on these days shall, in addition to such holiday pay, be paid at the rate of double time for all hours worked. In computing overtime pay, holidays shall be considered as days worked.

In order to qualify for eight (8) hours of straight time pay for a holiday not worked, it is provided that employees must work the regularly scheduled work day which immediately precedes and follows the holiday, except in cases of proven illness or injury substantiated by a doctor's statement.

Any overtime payments in accordance with the provisions of this contract shall neither be duplicated nor pyramided in whole or in part for the same hours worked.

Any replacement driver for inter-branch run will be paid overtime after eight (8) hours. All inter-branch runs are to be paid at the applicable straight time rate. However, if the inter-branch run is more than eleven (11) hours, then all additional hours will be at time and one-half. Any run that involves a direct delivery to a customer and continues to an Airgas USA, LLC location will not be considered an inter-branch run and will not be exempt from possible overtime. Any hours in a week in excess of 40 will be paid at time and a half.

Company may utilize Company Convenience (voluntary non paid non penalty days off).

ARTICLE 4. UNION OFFICIALS AND UNION STEWARDS.

The officials of the Union shall be permitted to enter the barns or garages or other working premises of the Employer with notice to confer with members of the Union.

One Steward will be permitted reasonable time on the clock to investigate concerns and represent members. The steward will not be subject to discipline or retaliation due to his/her representation of union members.

The steward will be required to attend contract negotiations meetings with the employer. The steward will be paid up to eight (8) hours per day during contract negotiations.

ARTICLE 5. BREAKDOWN TIME.

In the event any truck should become disabled while en route, resulting in overtime for that day, pay for this breakdown period shall be computed at time and one-half the regular hourly rate for any part of the breakdown time resulting in more than an eight (8) hour work day. This provision excludes inter-branch runs; however, if the inter-branch run is more than eleven (11) hours, then all additional hours of breakdown time will be at time and one-half.

ARTICLE 6. ADDITIONAL HELP.

No non-bargaining unit person shall be permitted to work in the driver or plant operations classification at any time a driver or plant operations employee is on layoff status, except in case of emergency and for the purpose of meeting immediate customer needs.

ARTICLE 7. REDUCTION OF PAY AND WORKING CONDITIONS.

No employee receiving more than the scale of wages and/or having better working conditions than provided for herein shall suffer a

reduction in pay or change in working conditions during the life of this Agreement, nor shall any deductions of any sort whatsoever be made from the wages of any employee without the consent of the employee, except as provided by law. When any employee is indebted to his Employer, the Employer shall have the right to reimburse himself for such indebtedness out of any monies due and payable to the employee.

ARTICLE 8. REPORTING FOR WORK.

In the event any employee is called to work and reports, he shall be guaranteed a minimum of pay for eight (8) consecutive hours, except on Sundays and holidays, when the guarantee shall be four (4) hours at the rate of double time. Employees called in to work on Saturday shall be guaranteed a minimum of pay for eight (8) consecutive hours at the rate of time and one-half. On an emergency recall occurring during the week, with the exception of a holiday, the employee shall be guaranteed four (4) hours pay at the rate of time and one-half.

ARTICLE 9. CHANGE OF DUTIES.

No employees shall receive less than the minimum wage rate provided for them herein regardless of the type of work which they are actually required to perform.

When an employee is requested to work in a lower rated classification, he shall receive his regular rate of pay for all such lower rated work performed.

In the event a CDL driver is disqualified by the DOT for medical reasons, the company will make every reasonable effort (based upon seniority, qualification and availability) to provide for said driver to bump into a plant position and plant wage rate on the following conditions:

1. Driver must provide a doctors statement that he is medically qualified to perform said Plant duties
2. Driver may bump in accordance with seniority language.

ARTICLE 10. OUTSIDE LABOR DISPUTES.

It shall not be a violation of this Agreement for any employee of the Employer to refuse to cross a picket line, but not including any picket line at the Employer's premises other than a picket line maintained by the Union in support of a legal primary strike against the Employer, where the picket line is established by the

Union herein, or any other union, as the collective bargaining representative of the employees of any employer, it being further provided that the establishment of said picket line must not be contrary to or in violation of the Labor Management Relations Act of 1947, or any other law. If an employee refuses to cross a picket line at a customer's place of business, the Employer may continue to serve the customer by other means. The Employer agrees that there shall be no lockout by the Employer during the term of this Agreement.

ARTICLE 11. SENIORITY.

Seniority shall prevail at all times.

Seniority shall be broken only by discharge, a voluntary quit, or a layoff of more than thirty-six (36) months. In the event of a layoff, an employee so laid off shall be given ten (10) days' notice of recall mailed to his last known address. The employee must respond to such notice within three (3) days after receipt thereof and actually report to work within seven (7) days after receipt of such notice. In the event the employee fails to comply with the above, he shall lose all seniority rights under this Agreement.

A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment.

In the case of a plant closure or transfer of employees to the Cincinnati location, there will be no dovetailing of employees. Employees who are transferred to the location will be placed at the bottom of the seniority list for all bidding.

Employees will bid once a year (December) on the jobs posted based on seniority including inter-branch driver position. Junior qualified person will be forced into open position.

The Bids will be posted no later than November 15th and will remain posted for two (2) calendar weeks. Employees awarded bids, will be placed in their new bid on January 1st.

If due to the annual bid, an employee has changed jobs and/or shifts and requires additional training, the Company will provide that training during January and the employee will be placed into their new bid on or before February 1st.

The process of an annual assignment posting must maintain the companies CDL driver needs and not lower these requirements during this posting process, to preserve the service offering to our customers.

Seniority shall be applied in layoffs, recalls and shift assignments. Job assignments shall be assigned based upon seniority.

If a layoff is required, temporary employees shall be laid off first, followed by probationary employees and finally seniority employees with the least seniority.

The company will make every reasonable effort to cross train employees for the purpose of expanding individual(s) qualifications & maintain a qualification grid by employee.

Extra work that results in overtime will be offered in seniority order. Preferred work and/or Job Assignments will be offered in seniority order.

ARTICLE 12. CHECK-OFF.

The Employer agrees to deduct from the employee's pay Union initiation fees and dues and remit such deductions to the Union monthly upon submission of a list of the employees from whose wages such dues and fees are to be deducted; provided, however, that the Union presents to the Employer signed authorizations from the employees to cover such deductions.

The Union agrees to indemnify and hold the Company harmless against any claims, suits, action, or judgments brought or issued against the Company as a result of any action taken by the Company under the provisions of this article.

ARTICLE 13. D.R.I.V.E.

The Employer agrees to deduct from the paycheck of all employees covered by this Agreement voluntary contributions to D.R.I.V.E. D.R.I.V.E. shall notify the Employer of the amounts designated by each contributing employee that are to be deducted from his/her paycheck on a weekly basis for all weeks worked. The phrase "weeks worked" excludes any week other than a week in which the employee earned a wage. The Employer shall transmit to D.R.I.V.E. National Headquarters on a monthly basis, in one check, the total amount deducted along with the name of each employee on whose behalf a deduction is made, the employee's Social Security number and the amount deducted from that employee's paycheck. The International Brotherhood of Teamsters shall reimburse the Employer annually for the Employer's actual cost for the expenses incurred in administering the weekly D.R.I.V.E. payroll deduction plan.

The Union shall indemnify and save the Company harmless against any and all claims, demands, suits or other forms of liability that shall arise out of or by reason of action taken or not taken by the Company in reliance upon written assignments furnished to the Company by the Union or for the purpose of complying with any of the provisions of this Article.

ARTICLE 14. VACATIONS.

Each employee, upon the completion of one (1) year's continuous service, will be allowed one (1) week's vacation with pay. Upon the completion of two (2) years' continuous service, two (2) weeks' vacation with pay. Upon completion of five (5) years' continuous service, three (3) weeks' vacation with pay. Upon completion of ten (10) years' continuous service, four (4) weeks' vacation with pay. Grandfather five (5) weeks vacation for employees hired prior to 12/1/1989. An employee may, with mutual consent of the Company, elect to receive payment in lieu of vacation for any allowance earned.

Each employee who is entitled to vacation under the terms above must be actively at work during the qualifying year. The qualifying year will be considered from the anniversary date to anniversary date.

Employees failing to work all of the qualifying year for vacation purposes will be paid on a pro rata basis at the rate of 1/12 of the vacation which would have been due had he completed his anniversary year for each month worked during the qualifying year. Any time lost due to compensable work-incurred injury up to fifty percent (50%) of the total working days in the year will be counted as time worked for the purpose of qualifying for vacation.

Employees terminating for any cause will be paid in lieu of vacation pay on a pro rata basis in the amount of 1/12 of the vacation which would have been due had the employee completed the anniversary year, for each month worked beyond the last anniversary date for which payment was made. Pro rata vacation payment will not be paid to employees with less than one (1) year's continuous service. If an employee who has not received his earned vacation is separated from the Employer for any reason whatsoever, he will receive pay in lieu of his vacation.

Vacation pay shall be computed on the basis of forty (40) hours' pay will include shift differential for each week of vacation. Vacations must be taken during the season designated and may not be accumulated from year to year. Employees who receive their vacations shall be given their vacation pay prior to going on vacation.

The vacation period of each qualified employee shall be set with due regard to the desire, seniority and preference of the employees, subject to the Employer's approval as being consistent with the efficient operation of its business; however, each employee shall choose not more than two (2) weeks' vacation together. If, however, three (3) weeks' vacation are available together without interfering with the seniority plan, they may be taken together by mutual agreement between the Employer and the employee.

At least ten percent (10%) of employees (2.5=3) per week may take vacation, provided, however, that the vacation does not disrupt the normal business operations. An employee with an approved vacation will be allowed to take the approved time.

If a holiday falls during a vacation week, the employee has the option of receiving pay for the day or taking the vacation day at a later date, provided prior notice is given to the Company and no more than two (2) employees are on vacation at any time.

ARTICLE 15. WAGES.

EFFECTIVE upon first pay period following ratification:

	2-25-13	12-1-13	12-1-14
Driver	\$21.05	\$21.50	\$21.95
Non CDL Employee	\$20.50	\$20.95	\$21.40
New hires after 12-1-09:			
Driver	\$19.00	\$19.45	\$19.90
Non CDL Employee	\$16.50	\$16.95	\$17.40

Section 3. Shift Differential. Employees on a shift basis will receive a premium of twenty-five cents (\$.25) per hour for the second shift (3:00 p.m. to 11:30 p.m.) and twenty-five cents (\$.25) per hour for the third shift (11:00 p.m. to 7:30 a.m.) when they work as a regular member of and have been regularly assigned to those shifts.

ARTICLE 16. HEALTH AND WELFARE.

Company will pay Central States Health and Welfare the following for all regular union employees for benefit coverage under the Plan M9 (Excluding Retiree Health Plan).

2-23-2013	\$263.70	Employee Pay	\$61.70 per wk
12-01-2013	\$294.20 max	Employee Pay	\$68.84 per wk
11-27-2014	\$326.50 max	Employee Pay	\$76.40 per wk

ARTICLE 17. RETIREMENT BENEFITS

Effective 1-3-2010 401K Supplemental Income Trust Fund
New employee must work for twelve months to be eligible.

The employee can contribute to their account up to IRS limits each year.

The Company will make a lump sum contribution to each eligible employee of:

Effective 1-3-2013 \$225.00 per quarter
Effective 1-1-2014 \$225.00 per quarter
Effective 1-1-2015 \$225.00 per quarter

Account maintenance fees will be paid by the employee and deducted from their account

At the effective termination date of this agreement or any extension thereof, the supplemental 401K program will be discontinued and Members of this bargaining unit will enjoy the same 401K schedule and policy as other un-represented employees of Airgas USA, LLC. This policy, referenced herein, may only be modified after written notice of changes has been sent to the union. The Employer reserves the right to revise this Plan consistent with other revisions that may be made during the term of this Agreement by the Employer for its non bargaining associates after notice to the union and opportunity for the union to discuss same.

Employee Stock Purchase Plan: Employee may participate in the ESSP Plan of Airgas in accordance with plan and any future amendments.

ARTICLE 18. GRIEVANCE PROCEDURE.

The Company cannot file a grievance.

Section 1. Grievances shall be presented in writing and settled as promptly as possible. If the grievance is not so presented within five (5) working days after it is known or discovered, it shall be deemed to have been waived.

Section 2. First Step. The grievance shall first be taken up by the employee, if he is the aggrieved party, with his supervisor, or vice versa.

Section 3. Second Step. If no satisfactory settlement is reached within five (5) days thereafter, then within another five (5) days the aggrieved party will submit copy of the written grievance so that the Union, the employee and the management shall be in receipt thereof, and the employee, the Union representative and management shall then attempt to adjust the grievance among themselves.

Section 4. Third Step. In case no satisfactory settlement is reached after the second step in the grievance procedure, then within five (5) days after the same shall have been first considered at such second step, a meeting may be called between the Union and the Employer, at the request of either. When such request is made by either party, it shall be honored by reasonable compliance at a mutually convenient time by the other party.

Section 5. Fourth Step. Failing satisfactory settlement within ten (10) days after the third step above, the parties agree to submit the matter to an impartial arbitrator who shall be selected by mutual agreement between the Employer and the Union. Should the parties fail to agree upon an impartial arbitrator, they shall request the Federal Mediation and Conciliation Service to supply the names of five (5) arbitrators. Upon receiving said list, within thirty (30) days, each party will strike names alternately reducing to one (1), said one being the arbitrator in the dispute. Should two names remain, then the arbitrator shall be selected by lot. The expense of the arbitration shall be borne equally by both parties.

Section 6. Any grievance not presented or processed within the time limits herein above set forth for the various stages of such procedures shall conclusively be presumed to have been waived.

Section 7. There shall be no strike, slowdown or work stoppage of any kind on the part of the Union or its members, nor shall there be any lockout on the part of the Employer, due to the filing of a grievance.

Section 8. No employee shall be discharged, suspended or taken out of service, except for dishonesty, or being under the influence of liquor, or drinking while on duty, or carrying unauthorized passengers, positive drug test, refusal to take drug or alcohol test without first being given a hearing by the Employer with a representative of the Union present at the hearing. Rules and regulations of the Employer shall not be in conflict with this Agreement, and employees shall have knowledge of such rules and regulations.

ARTICLE 19. NO STRIKE, NO LOCKOUT.

There will be no strikes of any kind, including sympathetic strikes, during this Agreement, except to the extent specifically provided otherwise in this Agreement. "Strikes" include any work stoppage, slowdown, picketing, or any other concerted activity or attempt at concerted activity which would interrupt or limit the performance of services. Neither the Union nor any employee will encourage, authorize, participate in or condone any strike.

The Union will use its best efforts to prevent any violation of this section and to terminate any violation should one occur. If a violation of this section occurs, the Union will publicly denounce the strike, and will provide the Employer with written notice that the strike is not authorized, is in violation of this Agreement, and is not to be honored. If the Union carries out its obligations under this section, it shall have no financial liability for any such violation.

The Employer shall have the right to discharge, demote, suspend, or in lieu of suspension to cause the forfeiture of a like number of days of paid vacation or holidays, or otherwise discipline employees for violation of this section. Employees so disciplined shall have recourse to the grievance and arbitration procedure, but the discipline imposed shall not be overturned unless the employee is found innocent of any violation, and the arbitrator shall have no authority or jurisdiction to reduce or modify discipline, except upon such a finding of innocence.

ARTICLE 20. FUNERAL LEAVE.

All unit members shall be subject to the Airgas bereavement policy on the same terms and conditions as all unrepresented employees, in accordance with the this plan and any future amendments.

ARTICLE 21. CONTRACT VIOLATIONS.

Notwithstanding anything to the contrary contained in this Agreement, it is agreed that in the event the Employer willfully violates the wage scale as herein set forth or fails to proceed with a grievance pursuant to the grievance procedure outlined herein or fails to file appropriate industrial compensation forms, the employees or their representatives, after the Union shall have given seventy-two (72) hours' notice by certified mail to the Employer of such violation, shall have the right to take such action as they deem necessary until the necessary wage adjustments are made or the necessary corrective action is taken. It is further agreed that in the event such strike action is taken, the Employer shall be responsible to the employees for any losses resulting therefrom. A willful violation of the foregoing

with regard to non-payment of the wage scale as set forth in this contract or failure to proceed with a grievance as outlined in this contract, or failure to file the necessary industrial commission forms shall not be subject to arbitration, and the Union shall not be held liable under the terms of any other provision of this Agreement pertaining to strike action.

ARTICLE 22. RIGHTS OF MANAGEMENT.

Subject to the terms of this Agreement, the following rights are vested in the Employer and are the exclusive functions of the Employer, provided, however, that in exercising these rights the Employer shall not act contrary to the provisions of this Agreement, and shall exercise such rights with due regard for the rights of the employees, and provided further, that they will not be used for the purpose of discrimination against any employee.

The rights vested in the Employer include, but are not limited to: the management and the direction of the working forces; the hiring, promoting, transferring and rehiring of employees; the planning, directing and controlling of operations; the suspending, discharging or otherwise disciplining employees for legitimate reasons; the scheduling and calling to work of employees, including the scheduling of reasonable amounts of overtime with required attendance thereat; the assigning and reassigning of employees to jobs, equipment, tours of duty and runs as it may deem desirable and consistent for efficient management; the right to establish, enforce and maintain reasonable rules and regulations covering the operation of the plant; the right to discontinue methods or processes; the right to determine the numbers of hours per day and per week the plant shall operate; the right to operate the business in the most efficient manner; the right to control the nature and specifications of all raw materials, semi-manufactured and finished goods and whether and to what extent the work required in its business shall be performed by employees covered by this Agreement; to temporarily transfer employees between jobs, shifts and departments in order to maintain efficient and/or economical operations; the right to discipline if any pertinent laws or official rules and regulations of the Employer are not adhered to.

All unit members shall be subject to the Airgas Alcohol and Drug policies on the same terms and conditions as all unrepresented employees, in accordance with the this plan and any future amendments.

Rules and regulations of the Employer shall not be in conflict with this Agreement, and employees shall have knowledge of such rules and regulations, and written acknowledgment of same shall become part of employee's personal records.

Disciplinary action taken by the Employer for violation of either Company rules and regulations or employees' violations of articles contained herein, will be handled in the following manner:

- A. Written warning notice stating violation will be given to employee, with a copy to Union and Union Steward and a copy becomes part of the employee's personal file;
- B. This written notice to be given within five (5) working days of said violation;
- C. If employee fails to respond to written notice within five (5) working days, violation(s) listed by Employer in notice shall be deemed valid and uncontested by employee;
- D. If employee wishes to respond to such notice in his defense, he may do so through grievance procedure listed elsewhere in this contract.
- E. The warning letter shall remain active in an employees file for a period of twelve (12) months from the date of such letter. After twelve (12) months, a warning letter will not be used for progressive discipline.
- F. Suspensions shall remain active in an employee file for a period of eighteen (18) months. After eighteen (18) months a suspension will not be used for progressive discipline.

Should the Employer fail to exercise any of its management rights, or exercise them in a particular way, it shall not be deemed to have waived such rights so long as none of the provisions of the Agreement are violated.

ARTICLE 23. LOSS OR DAMAGE.

Employees shall not be charged for loss or damage unless clear proof of gross negligence is shown.

ARTICLE 24. SAFETY

Safety Committee.

The Employer and the Union believe that safety is of the utmost concern. A safety committee will be established in accordance with the company safety (SAFECOR) most current guidelines (safety manual). Such committee shall contain an equal number of union and non-union members to address safety concerns.

Safety Equipment.

Safety shoes must be worn by employees at all times when they are performing work under this contract, unless excused in writing by the Company. Safety glasses and hard hats shall be furnished by Employer and shall be required equipment when designated by supervision. The Employer will supply safety shoes and safety prescription glasses per the most current company guidelines.

Uniforms.

The Employer will provide uniforms for all Employees.

ARTICLE 25. ACCIDENT REPORTS..

Any employee involved in any accident shall immediately report said accident and any physical injury sustained. As required by his Employer, the employee, before starting his next shift, shall make out an accident report in writing on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to the accident. Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

ARTICLE 26. TRANSFER OF TITLE.

In the event that the title or ownership of the Company is transferred, the Company hereby agrees to notify the Union of the transfer and to furnish in writing to the Union the name of the purchaser, and further, to notify the purchaser of the existence of this Agreement. The Company further agrees that the terms and conditions of this Agreement will remain in full force and effect for the duration of the Agreement.

ARTICLE 27. TERMINATION OF AGREEMENT.

This Agreement shall be effective as of December 1, 2012, and shall terminate November 30, 2015, provided that unless sixty (60) days' written notice is given by either party prior to such expiration date of his or its desire to negotiate a new Agreement, this Agreement shall remain in full force and effect from year to year, subject, however, to the giving of such notice sixty (60) days prior to November 30 of each year.

Notwithstanding anything else in this Agreement, no act, omission or event occurring after the termination of this Agreement shall give rise to any rights or liabilities under this Agreement, nor shall it be subject to arbitration. Any grievance or arbitration timely commenced during the life of this Agreement may be continued through its full course.

IN WITNESS WHEREOF, the parties hereto have subscribed their names and affixed their seals this 11th day of March, 2013.

COMPANY:
Airgas USA, LLC

UNION:
TRUCK DRIVERS, CHAUFFEURS AND
HELPERS, PUBLIC EMPLOYEES,
CONSTRUCTION DIVISION, AIRLINES
- GREATER CINCINNATI / NORTHERN
KENTUCKY AIRPORT AND
MISCELLANEOUS JURISDICTION,
LOCAL UNION NO. 100

BY: [Signature]

BY: [Signature]

AND BY: Kevin McBride
Airgas USA, LLC
President - Great Lakes Region

AND BY: [Signature]

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
09-CA-152301	May 14, 2015

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer AIRGAS USA, LLC		b. Tel. No. (513)563-7900
		c. Cell No. (513)464-6141
d. Address (street, city, state ZIP code) 10031 CINCINNATI-DAYTON RD, CINCINNATI, OH 45241	e. Employer Representative CLYDE FROSLEAR REGIONAL MANAGER	f. Fax No. (513)563-7920
		g. e-Mail clyde.froslear@airgas.com
		h. Dispute Location (City and State) Cincinnati, OH
i. Type of Establishment (factory, nursing home, hotel) Transportation of industrial gas	j. Principal Product or Service Propane and other industrial gases	k. Number of workers at dispute location 20

I. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On about April 29, 2015, the above-named Employer, by Clyde Froslear, threatened to change employees' terms and conditions of employment because the Charging Party filed grievances and filed charges with the National Labor Relations Board.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

STEVEN WAYNE ROTTINGHOUSE JR.

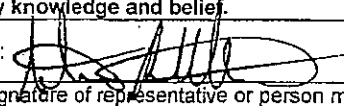
4a. Address (street and number, city, state, and ZIP code) 4221 HARDING AVE CINCINNATI, OH 45211	4b. Tel. No. (513)699-5327
	4c. Cell No. (513)607-3557
	4d. Fax No.
	4e. e-Mail steverottinghouse@yahoo.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No.
(513)699-5327

By: 
(signature of representative or person making charge)

STEVEN WAYNE
ROTTINGHOUSE, JR.

Office, if any, Cell No.
(513)607-3557

Print Name and Title

Fax No.

Address: 4221 HARDING AVE,
CINCINNATI, OH 45211

Date: 5-8-15

e-Mail
steverottinghouse@yahoo.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

1-1349497805

Joint Ex. 5(a)



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlr.gov
Telephone: (513)684-3686
Fax: (513)684-3946

August 20, 2015

MICHAEL C MURPHY
AIRGAS INC
259 N RADNOR CHESTER RD STE 100
RADNOR, PA 19087-5255

Re: AIRGAS USA LLC
Case 09-CA-152301

Dear Mr. Murphy:

This is to advise that I have approved the withdrawal of the Section 8(a)(3) and (4) portions of the charge. All other portions of the charge remain outstanding.

Very truly yours,

/s/ Garey E. Lindsay

Garey Edward Lindsay
Regional Director

cc: CLYDE FROSLEAR, REGIONAL MANAGER
AIRGAS USA, LLC
10031 CINCINNATI-DAYTON RD
CINCINNATI, OH 45241

STEVEN WAYNE ROTTINGHOUSE JR.
4221 HARDING AVE
CINCINNATI, OH 45211

Joint Ex. 5(b)

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE

Case

Date Filed

09-CA-155497

July 7, 2015

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer AIRGAS USA, LLC		b. Tel. No. (513) 563-7900
		c. Cell No. (513) 464-6141
d. Address (street, city, state ZIP code) 10031 CINCINNATI-DAYTON RD CINCINNATI, OH 45241	e. Employer Representative CLYDE FROSLEAR REGIONAL MANAGER	f. Fax No. (513) 563-7920
		g. e-Mail clyde.froslear@airgas.com
		h. Dispute Location (City and State) CINCINNATI, OH
i. Type of Establishment (factory, nursing home, hotel) TRANSPORTATION OF INDUSTRIAL GAS	j. Principal Product or Service PROPANE AND OTHER INDUSTRIAL GASES	k. Number of workers at dispute location 20

1. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3), (4) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

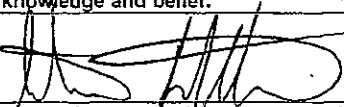
On about June 29, 2015, the above-named Employer suspended Steven Wayne Pottinghouse Jr. in retaliation for his protected Union activities and because he filed charges with the National Labor Relations Board.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

STEVEN WAYNE ROTTINGHOUSE JR.

4a. Address (street and number, city, state, and ZIP code) 4221 HARDING AVE CINCINNATI, OH 45211-4505	4b. Tel. No. (513) 699-5327
	4c. Cell No. (513) 607-3557
	4d. Fax No.
	4e. e-Mail steverottinghouse@yahoo.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. (513) 699-5327
By: 	STEVEN WAYNE ROTTINGHOUSE JR., AN INDIVIDUAL	Office, if any, Cell No. (513) 607-3557
(signature of representative or person making charge)	Print Name and Title	Fax No.
Address: 4221 HARDING AVE CINCINNATI, OH 45211-4505	Date: 7-7-15	e-Mail steverottinghouse@yahoo.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

1-1410619967

Joint Ex. 6(a)



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlr.gov
Telephone: (513)684-3686
Fax: (513)684-3946

September 22, 2015

STEVEN WAYNE POTTINGHOUSE JR.
4221 HARDING AVE
CINCINNATI, OH 45211-4505

Re: AIRGAS USA, LLC
Case 09-CA-155497

Dear Mr. Pottinghouse:

We have carefully investigated and considered your charge that AIRGAS USA, LLC has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge because there is insufficient evidence to establish a violation of the Act.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlr.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **October 6, 2015**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than October 5, 2015. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the

1 Joint Ex 6(b)

AIRGAS USA, LLC
Case 09-CA-155497

- 2 - September 22, 2015

appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before October 6, 2015**. The request may be filed electronically through the *E-File Documents* link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after October 6, 2015, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Garey E. Lindsay

Garey Edward Lindsay
Regional Director

Enclosure

cc: CLYDE FROSLEAR, REGIONAL MANAGER
AIRGAS USA, LLC
10031 CINCINNATI-DAYTON RD
CINCINNATI, OH 45241

MICHAEL C MURPHY, SENIOR DIRECTOR
LABOR RELATIONS & LABOR COUNSEL
AIRGAS USA, LLC
259 N RADNOR CHESTER RD, STE 100
RADNOR, PA 19087-5255

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Case Name(s).

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

November 5, 2015

STEVEN WAYNE POTTINGHOUSE JR.
4221 HARDING AVE
CINCINNATI, OH 45211-4505

Re: Airgas USA, LLC
Case 09-CA-155497

Dear Mr. Pottinghouse:

This office has carefully considered the appeal from the Regional Director's refusal to issue complaint. We agree with the Regional Director's decision and deny the appeal.

The evidence did not support your contentions that the Employer suspended you in retaliation for your union activities and/or your participation in Board proceedings. We could not overcome the Employer's assertion that it suspended you for legitimate business reasons, namely its belief that you violated DOT regulations by working off the clock while completing your paperwork. The Employer has a policy that employees cannot complete work off the clock, and that policy tracks DOT regulations. While you disagree that you were completing the paperwork, the evidence indicates that after an employee completes the paperwork, there are additional steps to be taken to verify the information and that such process is to be completed before an employee clocks off. Clearly, the full process had not occurred before you clocked out. In addition, there was no objective evidence of hostility linking the Employer's decision to your participation in Board proceedings.

Finally, in the absence of any indication what evidence the potential witness you suggest might offer that has not already been considered by the Regional Director in his determination of the matter, the investigation was deemed consistent with Agency procedures and sufficient to resolve the instant matter.

1
Joint Ex 6(c)

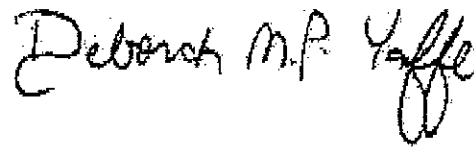
Airgas USA, LLC
Case 09-CA-155497

-2

For these reasons, we find no basis upon which to issue complaint and no basis for further proceedings.

Sincerely,

Richard F. Griffin, Jr.
General Counsel



By:

Deborah M.P. Yaffe, Director
Office of Appeals

cc: GAREY EDWARD LINDSAY,
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS
BOARD
550 MAIN ST RM 3003
CINCINNATI, OH 45202-3271

CLYDE FROSLEAR
REGIONAL MANAGER
AIRGAS USA, LLC
10031 CINCINNATI-DAYTON RD
CINCINNATI, OH 45241

MICHAEL C. MURPHY
AIRGAS
259 N. RADNOR-CHESTER RD
STE 100
RADNOR, PA 19087-5255

cl

8/6/15

Meeting with Barry Perkins (BP), Steve Rottinghouse (SR), Dave Luehrmann (DL) & Clyde Froslear (CF) to issue SR a warning letter for not securing his load.

CF-Explained to BP that I witnessed SR pulling into the yard, I heard loose cylinders rattling and when SR came to a stop saw them move, fall forward.

SR-I saw you taking pictures. Why didn't you come and get me?

CF-I told SR I took the pictures so I could send them to our driver trainer Mark MacBride for his opinion.

SR- The rattling noise was coming from a HY bank

CF- I asked why did you decide to get back up on the trailer and fix the pallet of cylinders we are talking about if the noise was coming from a HY bank?

SR- Because I saw you taking pictures.

CF- How did you know I was not taking pictures of the tailgate or trailer?

SR- Asked to see the pictures.

CF- I will be glad to but not right now. We are taking about why the load was not secure. The picture will show the same thing you saw and the reason you got back up on the trailer to fix. If you are arguing that the pallet was not the cause of the rattling noise, why did you get back up on the trailer, rearrange the straps and tighten the load down?

SR- Had nothing more to say so the meeting ended. SR refused to sign the letter. BP signed it and they both walked out.

BP- Came back to my office about five minutes later. He gave me grievance # 29582. At that time BP asked to see the pictures I took. I showed them to him and he asked me to keep them.

CF- I agreed to keep the pictures. BP and I both agreed the pictures show the cylinder were loose and could understand why Steve fixed them before leaving.

Meeting ended.

Joint Ex. 7



GRIEVANCE FORM

TEAMSTERS LOCAL UNION NO. 100

2100 Oak Road
Cincinnati, Ohio 45241

(513) 769-5100
(800) 769-5188

Affiliated with International Brotherhood of Teamsters

DISTRIBUTION

WHITE..... Union
YELLOW..... Steward
PINK..... Management
GOLD..... Employee

No 29582

PLEASE PRESS FIRMLY,
YOU ARE MAKING SEVERAL COPIES

NAME (please print) Steven Rottinghouse DATE GRIEVANCE FILED 8-6-15
ADDRESS 4221 Harding Ave
CITY Cincinnati STATE OH ZIP 45211
PHONE NO. 513-699-5327 LAST 4 DIGITS of SOCIAL SECURITY NO. 5753
EMPLOYED BY Airgas SENIORITY DATE 9-7-10
DATE I SAW MY EMPLOYER ON THIS GRIEVANCE 8-6-15 ARTICLE 22

INSTRUCTION TO EMPLOYEES:

1. When the grievance has been written, the YELLOW copy should be given to the steward, the PINK copy should be given to the foreman (or supervisor).
2. Grievance should be summarized clearly so that they may be understood.
3. By presenting the grievance, the employee grants to the Union complete authority to present, negotiate and bargain regarding this grievance and agrees to be bound by such disposition of the grievance as may be made or agreed to by the Union or its delegated representatives. The undersigned employee may be present at any and all steps of the grievance procedure.

GRIEVANCE: (give dates) on 8-6-15 Received Write up
for "loose cylinders" on truck 8-3-15. Written
warning issued. Only should be verbal. Cylinders
were leaning a little but not rattle. Rattling
cylinders were from Hy C23 with loose cys.
Requested pictures for union. Refuse to show pictures

MY CLAIM IS: "Leaning" cys were fixed before leaving yard
Written warning is excessive, should be removed

Your Signature [Signature]

DISPOSITION OF GRIEVANCE (to be filled in by Business Agent):

HEARING DATE: _____

Business Agent _____

Company Rep. _____

9/2/15

Grievance meeting 29582

Barry Perkins (BP), Steve Rottinghouse (SR), Dave Luehrmann (DL) & Clyde Froslear (CF)

CF- Tell me why you filed this grievance.

SR- While pulling into the yard the gate started to close, I hit my brakes which cause the cylinder to lean forward. I got up on the trailer and fixed the load before leaving. This all happened in the yard and I should not have received a warning letter.

CF- Not true. You had just come off the road and the cylinders were not strapped securely. So it didn't happen in the yard. If they were strapped securely hitting the brakes would not cause cylinders to lean. I have seen trailers turned over and cylinders still strapped in place. So I don't think hitting brakes would do this, do you?

SR- It's possible

CF- So tell me what part of the contract did we violate to warrant a grievance?

SR- I don't know. I don't have a copy of the contract with me.

CF- The grievance shows we violated article 22. Tell me what part of this article we violated.

BP- The warring letter should have been a verbal according to the contract.

CF- I read article 22, disciplinary action, paragraph "A" States – Written warning notice stating violation will be given to employee.

CF- I believe this is what we did. Do you disagree?

SR- A written warning is too severe; it should have been a verbal.

SR- Are you going to change the discipline or are we done?

CF- The discipline stays.

SR- So I guess we are done.

Meeting ended

9/23/15

Meeting with Ron Butts (RB), Barry Perkins (BP), Steve Rottinghouse (SR), Dave Luehrmann (DL) & Clyde Froslear (CF) to issue SR a warning letter for not securing his load.

RB-Reads grievance. We are here to reduce this to a verbal.

CF-I pointed out Article #22 paragraph "A" and asked RB to read it.

SR-Interrupted and said that the rattling was not the cylinders in question but cylinder in a hydrogen bank

CF-Explained to RB since he is not familiar with a cylinder bank, that there might have been additional rattling coming from the hydrogen bank but the cylinder are secured inside a steel cage. They are very secure and would not come out and possibly fall on to the highway. The cylinders we are talking about today were loose and could fall off the trailer.

CF- I asked RB to please explain to me what part of the contract we violated.

RB-Steve thinks the warning should be reduced to a verbal since this was his first offense.

CF-Mentioned that this was not Steve's first offense

RB-Asked if the letter would stay in Steve's file for 12 months as stated in the contract

CF-Yes

RB-Will you reduce this to a verbal.

CF-No because it is not Steve's first DOT violation and because of the severity of this event.

RB-Asked to step out and talk with SR, BP

RB-After meeting told me that he would have to consider this matter deadlocked and will be sending me a letter informing us that the Unions intensions are to arbitrate. Told me he would present this matter to the Unions Board

SR-Again mentioned that since this was his first offense that it should be a verbal

CF-Once again let's be clear this is not Steve's first DOT violation

CF-Once again I would like to know exactly what part of the contract did we violate.

RB-None other than Steve thinks it should be a verbal.

Meeting ended

Joint Ex. 10

JD-61-16
Cincinnati, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AIRGAS USA, LLC

and

Case 09-CA-158662

STEVEN WAYNE ROTTINGHOUSE, JR.
an Individual

Erik P. Brinker, Esq., for the General Counsel.
Michael C. Murphy, Esq. (Radnor, PA), for
the Respondent.

DECISION

Statement of the Case

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on February 16, 2016. Steven Wayne Rottinghouse, Jr. (Rottinghouse), the Charging Party, filed the charge on August 24, 2015.¹ The General Counsel issued the complaint on November 18. In its December 7 answer, Airgas USA, LLC (Respondent/Airgas) generally denied all alleged violations of the Act.²

The complaint alleges that Respondent violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act) when it issued a written warning to Rottinghouse in retaliation for providing affidavit testimony and filing charges in other cases before the National Labor Relations Board (the Board).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ All dates are in 2015 unless otherwise indicated.

² For brevity purposes, counsel for the General Counsel will be referred to as the "General Counsel."

Findings of Fact

I. JURISDICTION

Respondent, a Delaware limited liability company, has been engaged in the retail sale and distribution of industrial gases and related products at its office and facility located at 10031 Cincinnati-Dayton Road, in Cincinnati, Ohio (Respondent's facility/Cin-Day plant). In conducting its business during the 12-month period ending on November 1, Respondent derived gross revenues in excess of \$500,000. During the same period, Respondent has also purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Ohio. Respondent admits by stipulation, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. 11.)³

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Airgas management

Respondent has operated its sale and distribution of industrial gases business at its Cin-Day plant for about 8 years. At all relevant times, Clyde Froslear (Froslear) has been Respondent's operations manager over several of Respondent's facilities, including the Cin-Day plant which is central to this case. He oversees all operations including, but not necessarily limited to, production, distribution, safety, labor relations and employee relations. David Luehrmann (Luehrmann) is the Cin-Day plant manager, who directly manages the day-to-day plant activities and employees. Both he and Froslear discipline employees for any safety or other violations, but he generally does so with Froslear's input and approval. There is no dispute that Froslear approves discipline and tries to attend most disciplinary meetings. Along with his managers, he typically signs or initials most discipline.⁴

2. Airgas drivers

Airgas hires drivers to transport various industrial gases on trucks with trailers. These compressed gases are housed in cylinder tanks (also referred to as cylinders, tanks, and sometimes bottles). Drivers must secure them inside metal cages or pallets with straps and ratchets; and fasten them onto the trailers. However, some of the cylinders are preassembled by other employees (assemblers) into 6 or 12-pack cradles (also referred to as packs or banks), and bolted together and secured inside their own cages. The drivers are not responsible for securing the cylinders/tanks inside these cradles, but must make sure that the cradles are

³ Abbreviations used in this decision are as follows: "Tr." for Transcript; "GC Exh." for General Counsel Exhibit; "R. Exh." for Respondent Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's Brief; and "R Br." for Respondent's Brief.

⁴ The parties also stipulated that Froslear and Luehrmann are Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act. (Tr. 11.) The parties' other stipulations are set forth at Jt. Exhs. 1-10.

properly secured to the trailers. Employees therefore are not disciplined if the cylinders inside these cradles or packs sometimes move or rattle.

According to Froslear and Respondent's driver trainer, Mark MacBride (MacBride), the drivers are supposed to properly "nest" the cylinders (which are not preassembled in 6 or 12-pack cradles) and secure them with two straps so that each one is nesting tightly against another.⁵ Respondent's drivers are either assigned city routes within a 50-mile radius each way from the plant, or they are assigned long distance routes over 50 miles each way. City drivers must check to make sure their loads are secure at each stop, while long distance drivers must do so at least every 50 miles.

The Department of Transportation (DOT) regulates the manner in which Respondent and its drivers transport and secure cylinders. According to Respondent's driver training manual (revised December 1, 2014), this "means that cylinders must be strapped, chained or secured to the vehicle so that they do not move or rattle." Other relevant parts of this manual require that:

Small cylinders must be secured as well. You cannot transport cylinders if they have the ability to roll around, such as in a box or cage. Special care must be taken when transporting small cylinders. Please work with your supervisor to correct any cylinder transportation problems.

(GC Exh. 6, pp. 3-7). In various safety meetings, employees viewed several power point presentations on pallet, strap and load handling and securement. Relevant portions of those slides focused on the importance of pallet handling and general hazards associated with it such as loose cylinders falling and unsecured loads during transportation. One of the slides on physical loading and unloading dealt with the use of "proper cylinder nesting techniques" and use of "the back brace when strapping small quantities of cylinders to secure the load." (GC Exh. 6, pp. 7-11, 15-17).

Respondent also provided employees with safety training on compliance, safety and accountability (CSA) in 2014. Commercial motor vehicle (CMV) drivers, such as Respondent's employees, along with their employers, receive citations and fines during DOT and other law enforcement roadside stops for violating DOT regulations and/or committing one of the "Seven Basics" of CSA. One of those basics is "Cargo Related (Load Securement), under which "[f]ailing to properly secure the load . . ." is listed. (See GC Exh. 6, pp. 5-12).

3. Charging Party Rottinghouse and his protected activities

Charging party Rottinghouse is one of Respondent's experienced commercial drivers at the Cin-Day plant, who drives both city and longer distance routes. The record reveals that prior to late June 2015, he maintained good safety and driving records, with no DOT or Airgas

⁵ MacBride trains new Airgas drivers on policies and safety procedures. He also rides with all drivers, including the experienced ones, each year and reviews policies and procedures dealing with safety, DOT compliance and policy updates. At the end of each trip, he points out any problem areas that drivers need to work on, and documents his review. (Tr. 193-194.)

rule violations. Training records show that he attended and satisfactorily completed the various safety trainings and presentations provided by Respondent, including those described above on proper load securement. (GC Exh. 6.)

Rottinghouse was an active member of the Union. In addition, prior to the underlying charge in this case, he filed two other charges with the Board. In the first, Case 09-CA-152301, filed on May 14, 2015, he alleged that in April safety meetings, Froslear threatened to change employees' terms and conditions of employment because of his filed grievances and Board charges. More specifically, at issue were Froslear's comments about disciplinary policy during two April 28 employee safety meetings. Froslear and Luehrmann provided affidavit testimony in that case (on July 13), which was subsequently resolved on September 9, 2015. (Jt. Exh. 5; GC Exh. 2).⁶ In the second, 09-CA-155497, filed on July 7, 2015, he alleged that Respondent suspended him for 3 days in retaliation for protected union activities and filing charges with the Board. Respondent suspended him for dishonesty and deliberate, severe violation of Airgas and Department of Transportation (DOT) policy when on June 22, he completed DOT paperwork off the clock. Froslear testified that he would have terminated Rottinghouse for this offense, but instead followed his legal counsel's advice not to do so. On September 22, 2015, the Regional Director dismissed this charge due to insufficient evidence to establish a violation of the Act. (Jt. Exh. 6.) On November 5, the Board denied Rottinghouse's appeal of that dismissal. (Id.)

Rottinghouse and Froslear also attended a grievance meeting on August 5 concerning his prior three-day suspension.⁷ (Tr. 61-62; 147-148).

B. August 3, 2015 Incident, Its Aftermath and Discipline

1. August 3 incident

On the morning of August 3, Rottinghouse left the Cin-Day plant in his truck along with a coworker, Robert Oestreicher.⁸ They went to a General Electric (GE) facility, and while there, made several stops to pick up empty cylinders. One of those stops at GE was a "training stop," where Oestreicher showed him how to lift a 12-pack cradle of cylinders with a crane.⁹ Rottinghouse also carried at least one other load of cylinders, attached to a metal pallet with two straps, on his truck. When they left GE, they returned to Respondent's facility.

⁶ On August 20, the Regional Director approved withdrawal of the 8(a)(3) and (4) charge allegations. The settlement included a notice posting that Respondent would not "threaten to change" its discipline policy due to prior charges or participation in the Board process; it did not contain a nonadmissions clause. (Jt. Exh. 5(d).)

⁷ Froslear recalled that such a meeting took place, but not the date on which it occurred. Since he could not rebut that it did occur on August 5, I credit Rottinghouse's testimony that it did. (Tr. 61-62; 147-148.)

⁸ When asked on cross-examination, Oestreicher admitted that he was not only Rottinghouse's coworker, but also his stepfather. (Tr. 177.)

⁹ Froslear testified that he did not know about Oestreicher riding with Rottinghouse on August 3, but no one disputed that Oestreicher did so. (Tr. 38-39, 134-137, 168.)

Upon reaching the Cyn-Day plant, Rottinghouse stopped his truck, got out and opened the entrance gate. After returning to his truck and driving forward a bit, the gate blew back towards his truck, causing him to abruptly hit the brakes in order to avoid hitting the gate.¹⁰ At that point, without having to get out, he pushed the gate back away from his truck, and
 5 proceeded through the entrance and parked his truck in Cyn-Day plant's yard close to the building. Both he and Oestreicher left the truck and entered the plant/building.

Rottinghouse claimed that once inside, he saw and made eye contact with Froslear, who was about 20 feet away from where he (Rottinghouse) stood in the break room near the
 10 mailboxes. They did not speak. After using the restroom, he proceeded back out to his truck, and saw Froslear taking a picture with his phone. He testified that he walked around the driver's side to the back of the truck to see what Froslear was looking at. He stated that as he approached the back of the truck from driver's side, he and Froslear, who was about 10–15 feet away on the rear passenger side, made eye contact with each other. He further testified that as
 15 he continued on to the rear passenger side to the truck's lift controls, Froslear walked back into the building without saying a word. It is undisputed that next, Rottinghouse climbed onto the back of his truck, and straightened and re-strapped four leaning cylinders. After doing so, he got into his truck, left the Cyn-Day plant and completed his route. (Tr. 139–144, 146.)

According to Froslear, he was standing by his car in the parking lot near the plant entrance when he witnessed Rottinghouse pull into the driveway, stop to open the gate and continue on to park in the yard.¹¹ He testified that at the same time, he also “heard . . . rattling” and “witnessed cylinders falling” on the back of Rottinghouse's truck when it “came to a stop.” When asked if he actually saw them fall, Froslear admitted that they did not fall down, but
 25 “tilted” over 10–15 degrees. (Tr. 28–29.) He testified that “[w]hen [Rottinghouse] entered the yard until he came to a stop, they [the cylinders] were standing straight up. When he came to a stop, they tilted.” When asked exactly when he saw the cylinders move, he responded that “I saw them tilt when he came to a stop in the yard,” and not at the gate. (Tr. 31–32, 34.) Next,
 30 Froslear went back inside the building, retrieved his cell phone and safety glasses and proceeded out to photograph the cylinders on the back of Rottinghouse's truck. Froslear never physically examined or even touched the cylinders, but testified that he did not need to do so because he had seen them move. Afterwards, he went back inside the plant where he observed Rottinghouse (from a window) fix the leaning cylinders. (Tr. 28–30, 37–38, 65).

Froslear denied seeing Rottinghouse at any time after he [Rottinghouse] parked his truck in the yard. He testified that he was too busy concentrating on getting his camera and safety glasses; he also claimed not to have known where Rottinghouse was. He admitted, however, that he saw no need to try to find or talk to him at any time on August 3 since he
 35 witnessed the cylinders tilt and Rottinghouse sufficiently secure them. (Tr. 38–39, 42). In fact,
 40 he swore that he would not have allowed a driver to return to the road with a “serious safety

¹⁰ I credit Rottinghouse's testimony that he made an abrupt, “hard” stop at the entrance gate. Oestreicher supported it, stating that Rottinghouse “stepped on his brakes real hard,” and had to reopen the entrance gate. (Tr. 167–169.) Froslear denied seeing Rottinghouse make an abrupt or hard stop at the gate, but did not dispute that it might have occurred. (Tr. 30–35; Jt. Exh. 9.)

¹¹ Both Oestreicher and Rottinghouse testified that they observed Froslear standing by his car when they pulled into the plant. (Tr. 137–138, 170.)

issue” without first ensuring that it had been corrected. (Tr. 37.) For reasons discussed below, I discredit Froslear’s testimony that he did not see or know where Rottinghouse was, and that he actually witnessed the cylinders tilt over.

5 There is no dispute that the photograph that Froslear took accurately depicts the condition of the leaning cylinders in question after Froslear parked his truck in the Cyn-Day plant’s yard. It reflects four cylinders leaning slightly to the left—three tall cylinders in the back row with one shorter, smaller leaning against the front of two of the taller ones. It also shows two straps, fastened with ratchets, around the cylinders. The lower strap, however,
10 drapes down the front of the shorter, smaller cylinder in front. (See Jt. Exh. 2.)

2. Froslear’s actions on August 4

15 On August 4, Froslear sent an email to Respondent’s driver trainer, MacBride, with an attached photograph of the leaning cylinders on the back of Rottinghouse’s truck. He asked MacBride “What do you think about this? Look good to you?” MacBride responded, “[n]o with the cylinders being offset we would be hit for insecure load just by how it looks. Where is this truck.” Froslear replied, “CinDay.” MacBride stated, “[n]ot good, did the driver catch it before leaving,” to which Froslear replied “I saw it when he pulled into the yard.” MacBride
20 then asked “Did it get fixed before leaving,” and MacBride responded, “[t]his is the way it was when he pulled in after his run.” MacBride emailed back “Unacceptable” Froslear then asked “[w]here would I find the strongest language about load securement that drivers are trained to?” MacBride told him that he could find such “[i]n the driver training manual.” Finally, Froslear told MacBride to call him when he had time, and “to zoom in on how the cylinders were
25 strapped down.” During this email exchange, Froslear did not tell MacBride that Rottinghouse had been driving the truck in question, nor did he tell him that Rottinghouse fixed his load before returning to the road. (Tr. 116–117; Jt. Exh. 3.)

3. Rottinghouse’s discipline and grievance meetings¹²

August 6 discipline meeting

30 On August 6, Froslear and Luehrmann met with Rottinghouse and issued him a written warning letter (dated August 5) for failing to secure cylinders.¹³ Barry Perkins (Perkins), union
35 representative, attended the meeting on Rottinghouse’s behalf. The warning letter stated:

40 On Monday afternoon, 8/3/15, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped down, which was causing the noise.

¹² Froslear took notes of each of these meetings, which were submitted by the parties as joint exhibits (Jt. Exhs. 7, 9–10.) I credit these notes as being an accurate version of what was said during the meetings. Neither Rottinghouse nor his union representative, Barry Perkins, disputed the accuracy or contents of Froslear’s notes.

¹³ The parties stipulated that the warning letter, dated August 5, was issued on August 6.

You have been trained on the proper way to secure cylinders while being transported. According to the Driver Training Manual, ‘cylinders must be strapped, chained or secured to the vehicle so that they *do not move or rattle.*’

5 **Recommended correction action:**

As an Airgas Driver, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with
10 Airgas. For this reason you are expected to properly secure cylinders when transporting them, as well as follow all other DOT procedures while performing any other duties related to your job.

15 ***Consequences of not following recommended action:***

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers, and the general public. It is your responsibility to follow Airgas’ standard safety policies and procedures as well as other policies of the Company and to role model the
20 behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

25 Rottinghouse refused to sign the warning letter. Luehrmann signed it; Perkins signed as a witness; and Froslear initialed it. (Jt. Exh. 1;. 4, p. 19.)

During that meeting, however, Froslear explained that when he saw Rottinghouse pulling into the yard, he “heard loose cylinders rattling and when [Rottinghouse] came to a stop
30 saw them move, fall forward.” Rottinghouse told Froslear that he saw him taking pictures, and asked why he (Froslear) did not come to get him. Froslear responded that he “took the pictures so [he] could send them to our driver trainer Mark MacBride for his opinion.” Rottinghouse said that the “rattling noise was coming from a HY bank.”¹⁴ Froslear asked why he decided to return to the trailer and fix the leaning pallet of cylinders if the noise was coming from a HY
35 tank. Rottinghouse responded, “[b]ecause I saw you taking pictures.” Then, Froslear asked how Rottinghouse knew that he “was not taking pictures of the tailgate or the trailer.” Next, Rottinghouse asked to see the pictures. Froslear answered that he would “be glad to, but not right now.” He further stated that “[t]he picture will show the same thing you saw and the
40 reason you got back up on the trailer to fix. If you are arguing that the pallet was not the cause of the rattling noise, why did you get back up on the trailer, rearrange the straps and tighten the load down?” Then, Rottinghouse refused to sign the letter, and the meeting ended. (Jt. Exh. 7.)

Several minutes later, Perkins returned to Froslear’s office, presented him with Rottinghouse’s grievance #29582 filed with Local 100, and asked to see the pictures that he had

¹⁴ HY bank refers to a 12-pack cradle of hydrogen cylinders. No one disputed Rottinghouse’s testimony that these cylinders were empty when he returned to the Cyn-Day plant on August 3.

taken. Froslear showed him the pictures. According to Froslear's notes, both he and Perkins "agreed the pictures show the cylinder[s] were loose and could understand why Steve fixed them before leaving." (Id.)

5 The grievance/claim stated in relevant part the following:

[O]n 8-6-15 Received write up for 'loose cylinders' on truck 8-3-15. Written warning issued. Only Should Be Verbal. Cylinders are leaning a little bit But not Rattle. Rattling cylinders were from Hy C23 with loose cyls. Requested pictures for union. Refuse to show pictures . . . Leaning cyls were fixed Before leaving yard written warning is excessive, Should Be Removed

(Jt. Exh. 8.)

15 **September 2 grievance meeting**

Rottinghouse and Perkins met with Luehrmann and Froslear again on September 2. Rottinghouse explained why he should not have received a warning letter. He stated that "[w]hile pulling into the yard the gate started to close. I hit my brakes which cause the cylinder to lean forward. I got up on the trailer and fixed the load before leaving. This all happened in the yard and I should not have received a warning letter." Froslear responded:

Not true. You had just come off the road and the cylinders were not strapped securely. So it didn't happen in the yard. If they were strapped securely hitting the brakes would not cause cylinders to lean. I have seen trailers turned over and cylinders still strapped in place. So I don't think hitting brakes would do this, do you?

(Id.) Rottinghouse replied that "[i]t's possible."

When asked by Froslear what part of article 22 of the CBA Respondent violated, Perkins responded that the "warning letter should have been a verbal according to the contract." Froslear pointed out that article 22, paragraph A states that a "Written warning notice stating violation will be given to employee." Rottinghouse repeated that the written warning "is too severe; it should have been a verbal." When Froslear refused to change the discipline to a verbal warning, the meeting ended. (Jt. Exh. 9.)

September 23 grievance meeting

The parties met once more on September 23, with Ron Butts, another union representative, and Barry Perkins representing Rottinghouse, and Luehrmann and Froslear for Respondent. Butts read the grievance and said that they were there "to reduce this to a verbal." Froslear asked Butts to read article 22, paragraph A. At that point, Rottinghouse interrupted, stating that "the rattling was not the cylinders in question but cylinder in a hydrogen bank." Froslear's notes reflected his response:

Explained to RB [Ron Butts] since he is not familiar with a cylinder bank, that there might have been additional rattling coming from the hydrogen bank but the cylinder[s] are secured inside a steel cage. They are very secure and would not come out and possibly fall on to the highway. The cylinders we are talking about today were loose and could fall off the trailer.

(Jt. Exh. 10.)

Finally, in response to Froslear's question about which part of the contract he had violated, Butts said that "[Rottinghouse] thinks the warning should be reduced to a verbal since this was his first offense." Froslear pointed out that this was not the first offense. Butts then asked if the warning letter would stay in Rottinghouse's file for 12 months, Froslear said that it would. Butts asked again if Froslear would reduce the written warning to a verbal one, and Froslear still refused to do so, stating "[n]o because it is not Steve's first DOT violation and because of the severity of this event." (Id.)

Butts then stepped out to talk to Perkins and Rottinghouse. Afterwards, Butts told Froslear that he considered the matter "deadlocked," and would be sending a letter documenting the Union's intentions to arbitrate and present the matter to the "Unions Board." (Id.)

C. Respondent's Discipline Policies And Discipline Issued

1. CBA

The collective-bargaining agreement (CBA) between Respondent and the Union Local 100,¹⁵ article 22 (rights of management section), set forth the manner in which Respondent should take disciplinary action against employees who violated rules and regulations. Its relevant parts state:

Disciplinary action taken by the Employer for violation of either Company rules and regulations or employees' violations of articles contained herein, will be handled in the following manner:

A. Written warning notice stating violation will be given to employee, with a copy to Union and Union Steward and a copy becomes part of the employee's personnel file;

B. This written notice to be given within five (5) working days of said violation;

¹⁵ The collective-bargaining agreement (CBA) between Respondent and the Truck Drivers, Chauffeurs and Helpers, Public Employees, Construction Division, Airlines- Greater Cincinnati/Northern Kentucky Airport and Miscellaneous Jurisdiction, Greater Cincinnati, Ohio Local Union 100, an affiliate of the International Brotherhood of Teamsters (the Union/Local 100) was effective from December 1, 2012 through November 30, 2015.

...

E. The warning letter shall remain active in an employee[‘s] file for a period of twelve (12) months from the date of such letter. After twelve (12) months, a warning letter will not be used for progressive discipline.

F. Suspensions shall remain active in an employee file for a period of eighteen (18) months. After eighteen (18) months a suspension will not be used for progressive discipline.

(Jt. Exh. 4, p. 16.) Therefore, according to the CBA, all discipline began with a written warning letter; there was no mention of or provision for any type of verbal warning. (Jt. Exh. 4, p. 16.)

2. Airgas Procedure/Policy

There is little dispute that the Cin-Day facility management discipline policy departed from the CBA’s article 22. However, there was some disagreement, inconsistency, and apparent confusion on Froslear’s part, as to when and how it did so. When asked at hearing how Respondent’s employee “progressive discipline policy” works, Froslear stated that “[f]or minor offenses, in the past we would verbally approach the employee and tell him what was going wrong. Per the contract, it starts at written and then it’s suspension.”

As previously stated, Froslear addressed Respondent’s disciplinary policy during two safety meetings with employees in April (28th). When asked if he told employees in those meetings that they would receive verbal warnings for minor offenses, he responded that “during the meeting, what I told them was that, moving forward, we were going to no longer—a verbal pat on the back, hey, you forgot your safety glasses, that we were going to have to document it.” (Id.) However, in connection with Case 09–CA–152301, he gave sworn Board affidavit testimony that:

At the meeting I wanted to make clear to the employees that once they violated a rule for the second time, they would receive a written warning...In the collective bargaining agreement for this facility...the disciplinary process says that an employee will... get a written warning after the first violation of rule... However, for example, if we see an employee not wearing safety glasses we will first tell that employee to make sure they are wearing their safety glasses. However, if we see the same infraction again we will give that employee a written warning.

(Tr. 25–26; GC Exh. 2.) After reading his affidavit testimony, Froslear backtracked, and added that in those meetings, he told the team that “. . . moving forward we were going to document that conversation as a progressive discipline. I want to document everything moving forward.” (Tr. 27.) When asked why he stated in his affidavit that “[a]t the meeting I wanted to make clear to employees that once they violated a rule for a second time they would receive a written warning,” he said that “the first one’s going to be a verbal documented. The second one would be a written document. All will be documented.” (Id.) He also claimed that he issued

warning letters to employees who repeated minor offenses and to employees who committed major or serious first time violations. This is a clear departure from his affidavit, in which he testified that he “never said that the disciplinary process was changing” going forward, and during which he never made any distinction between major and minor offenses. (GC Exh. 2.)

In Luehrmann’s Board affidavit in Case 09–CA–52301, he stated that Froslear used the hypothetical about safety glasses “to illustrate his point about the disciplinary procedure,” and tell employees that “if a manager saw an employee without safety glasses, the manager would verbally remind the employee to make sure he was wearing his safety glasses. If the manager then saw the same employee committing the same infraction, the manager would give that employee a written warning.” Luehrmann testified that it “is the same disciplinary process that has always been in place, Froslear simply wanted to make sure all employees understood it;” he emphasized that “Froslear did not change the disciplinary process or procedure” in those meetings or threaten to do so. (GC Exh. 3; Tr. 102–103). Unlike Froslear, Luehrmann’s hearing testimony regarding this matter was consistent with his (Luehrmann’s) prior affidavit testimony. Therefore, for purposes of this case, I credit Luehrmann’s more consistent, testimony regarding statements made by Froslear at those April employee safety meetings.

3. Discipline issued by Respondent

The General Counsel introduced evidence of disciplinary statements issued to Respondent’s employees from 2011 through 2016, with various titles: verbal counseling, verbal warning, written counseling, written warning, warning letter and suspension.¹⁶ All of these statements, including verbal counselings and warnings, were documented in writing. It was undisputed that Froslear made no distinction between a “written counseling,” “written warning” or “warning letter,” and considered them to be “equal.” (Tr. 82.)

A review of the history above shows that, more often than not, Respondent handed out discipline a couple of days or more after the incident in question. Therefore, it was not unusual that Rottinghouse received his warning letter 3 days after the cylinder incident. In addition, it reflects that Respondent’s practice, irrespective of the CBA, article 22 provision, was to issue documented and undocumented verbal counseling and warnings for certain first time offenses. Respondent issued these types of verbal discipline through September 21, 2015. (GC Exh. 4, pp. 6, 8–10, 13–16, 20).

The only discipline of record for carrying an unsecured load was a “written counseling” issued to employee Huff on March 10, 2011 for transporting unsecured cargo (on March 8) in the form of a loose cylinder on the floor of the trailer, a pallet of liquid containers secured with only one strap and another unsecured pallet. This was documented as a DOT violation, and he was required to review DOT/Safecor driver requirements for securing cylinders and to ride with the driver trainer. I note that Rottinghouse received a written warning, but was not required to take any remedial action other than to follow the rules. (GC Exh. 4, pp. 1, 19; Jt. Exh. 1).

¹⁶ See GC Exh. 4, pp. 1–21; GC Exh. 7. Respondent provided these documents in response to the General Counsel’s subpoena duces tecum.

Most verbal discipline was documented as a “verbal counseling” or “verbal warning.” In 2013, they were issued to: employee Hollander for leaving grease on the steering wheel of a forklift; employee Carlo for not wearing proper leather gloves when filling high pressure cylinders; and employee Jeffries for a preventable backing accident. In 2014, they issued to employee Perkins for not wearing a seatbelt while using a forklift. In 2015, to employees Huff and Kinkade for DOT violations of clocking in 1-3 minutes early¹⁷, and to employee Oestreicher for talking on the cell phone while operating a tow mower. (GC Exh. 4, pp. 6, 8–9, 13–15, 20; GC Exh. 7.) Another, dated in 2013, and reduced to a verbal counseling from an unrecorded greater discipline, issued to employee Reed for DOT violation of driving while on the phone. This verbal counseling noted that Reed’s conduct could have subjected him to a \$2570 fine and Airgas to an \$11,000 fine. (GC Exh. 4, p. 10). Froslear could not recall whether or not this discipline was reduced through a grievance, but there is no doubt that it was reduced. In addition, an untitled note, not written on the standard Airgas form, reflected a discussion with an employee “Steve” in 2013 for a load verification mistake.¹⁸ (GC Exh. 4, p. 9.) There is also evidence of two unwritten verbal discussions—one with employee Baker on November 14, 2011 for a first offense of not wearing safety glasses, and another with employee Haynes in November 2013 for his first offense of improperly performing the pre-fill inspection process (costing the operation \$2,500). (GC Exh. 4, pp. 3, 11).

“Written counseling” statements and “written warnings” were issued as follows: in 2011, to employee Bowman for a backing accident and employee Baker for a repeated incident of not wearing safety glasses; in 2012, a second to Baker for failing to complete and correct his trip load verification and hazardous material manifest—actions that “cause incorrect cylinder balances at our customer, incorrect stock level internally and violates DOT requirements;” in 2013, to employee Hollander for not wearing a seat belt while operating a forklift, noting that this followed a verbal warning for his first offense of leaving grease on a steering wheel (see above); in 2014, to employee Haynes for failing to fill cylinders and perform the proper prefill inspection process “resulting in episodes uncovered recently,” and which cost Airgas \$4500; in 2016, to employee Huff for a preventable backing accident (ran into the side of another company’s building). (GC Exh. 4, pp. 2–4, 7, 11–12, 21). The written warnings to employees Baker and Hollander were the only instances of record where Respondent issued written warnings after first giving some type of verbal discipline for a violation of the same or another rule. (See above; GC Exh. 4, pp. 3, 6–7).

Of note, Baker received his second written warning within about 6 months of his first, which did not mention the first one. And, within about 5 months of the second warning, he received a 3-day suspension for being caught on the road, during a DOT inspection, without a valid medical certificate. The suspension stated that “[t]his is not the first issue you have had following DOT compliance as an Airgas driver.” (GC Exh. 4, pp. 3–5). The only other

¹⁷ DOT regulations require that commercial truck drivers be off duty for 10 consecutive hours prior to clocking in for their next shift.

¹⁸ There was no evidence presented that this “Steve” was the Charging Party. Leurhmann testified that he signed this note, but was not involved in the matter. However, the signature or initials on it appear to be Froslear’s when compared to Froslear’s initials at the bottom of Rottinghouse’s warning letter (Tr. 108; GC Exhs., pp. 4, 19.)

suspension was the 3-day suspension given to Rottinghouse on June 26, 2015. (GC Exh. 4, pp. 17–18.)

Froslear testified that Respondent considered more serious or “major” Airgas or DOT violations to include incidents such as backing or motor vehicle accidents, driving with unsecured loads, “going down the road with incorrect paperwork” (failing to provide complete and correct trip load verification and hazardous material manifest), and driving a vehicle without a valid medical certification.¹⁹ (Tr. 69–94.) He did not, however, consider a first offense to be major when it resulted in Respondent having to spend thousands of dollars in costs. (Tr. 94). I reiterate that he did not share these distinctions with employees during the April employee safety meetings or in his previously discussed Board affidavit.

There appears to have been at least two exceptions to Froslear’s serious incident rule, wherein employees receive warnings rather than verbal discipline for first time major/serious violations. Regarding the first, employee Jeffries only received verbal discipline for his preventable vehicle backing accident on May 10, 2013. (GC Exh. 7.) This particular verbal warning, issued and signed by Luehrmann, was not written on a standard Airgas discipline form. Luehrmann did not recall whether or not he had received Froslear’s approval prior to issuing the discipline, but did recall providing it to him in connection with the General Counsel’s subpoena. Froslear testified that he never knew about this incident prior to the hearing. However, I discredit testimony that he was not familiar with this verbal warning. Other evidence shows that he approved discipline at the Cyn-Day plant. Nevertheless, both he and Luehrmann considered a backing accident to be a serious offense. Next, I find it incredulous, that in employee Reed’s case, Froslear did not consider a commercial truck driver talking on the phone while driving on the road a serious DOT infraction. He obviously believed it to have been at the time, since it was reduced from some form of greater punishment. Moreover, DOT apparently considered it to be a serious or major violation since it levied substantial fines for such offenses on both drivers (\$2570) and their employers (\$11,000) (for Company). (GC Exh. 4, p. 10.)

According to Froslear, other examples of minor Airgas or DOT violations included failing to wear gloves, leaving grease on equipment, not wearing safety glasses, and clocking in a few minutes too early. (Tr. 69–94.)

III. ANALYSIS

A. Preliminary Determinations

1. Evidentiary finding

Rottinghouse testified that during the August 6 meeting, he asked Froslear to go check the 12-pack cradle that had been on his truck to see if it rattled, but that Froslear refused to do so. He claimed that the same cradle had been removed from his truck, at an unspecified time by an unspecified person, between August 3 and 6, and stored at the Cyn-Day plant until

¹⁹ Froslear also considered completing DOT paperwork off the clock to be a severe violation. (See Rottinghouse’s suspension at Jt. Exh. 1 & GC Exh. 4, pp. 17–18.)

August 6. He further testified that after the August 6 meeting, he (Rottinghouse) he took a video recording, with audio, of him shaking the same 12-pack. The General Counsel played this video at the hearing; and, it indeed showed Rottinghouse moving a 12-pack cylinder bank back and forth, causing it to make noise. The General Counsel offered this video to support Rottinghouse's claim that the noise that Froslear heard on August 12 came from the 12-pack of hydro cylinders, over which Rottinghouse had no control, versus the tilting cylinders. I admitted this recording into the record; however, I give it little if any evidentiary weight. The General Counsel failed to show that it was the same 12-pack cradle, or that if it was, that it had remained in the same condition (i.e., no chain of custody evidence presented). Next, there is no evidence that Rottinghouse's shaking demonstration constituted an accurate simulation of motion and rattling that might have resulted from a sudden stop at the plant's gate. (Tr. 152–161; Jt. Exhs. 1, 7, 9–10.)

2. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, supra at 623 (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622. Indeed, in this case, I have believed witnesses on some points, but not on others. If there is any evidence not recited herein that might seem to impact the credited facts set forth, I have not ignored such evidence, but considered it and determined it is not essential in deciding the issues, or I have rejected or discredited it as not reliable or trustworthy.

Although I credited Rottinghouse's testimony that he made a sudden stop to avoid hitting the gate, I doubt his testimony that the sudden stop caused the cylinders on his truck to tilt over. During the August 6 disciplinary meeting, he never mentioned that he believed that the cylinders on his truck tilted as a result of his sudden braking at the gate. He did not offer this explanation until the September 2 grievance meeting. (Jt. Exhs. 7, 9.) (Jt. Exhs. 7, 9.) I find that if he really believed that his sudden braking caused them to move, he would have told Froslear so at the August 6 meeting. Therefore, I do not credit Rottinghouse's testimony that he knew when or how the cylinders on his truck must have moved. Rather, I find that he speculated about what happened after he received the warning letter.

Next, I find that contrary to testimony by Perkins and Oestreicher (see below), the cylinders were not properly secured. As stated, even Rottinghouse believed that they were not, and accordingly, fixed them before resuming his route. He even acknowledged that he should have been issued a verbal warning rather than none at all.

There is no dispute that the cylinders on Rottinghouse's truck at some point tilted while they were being transported back to the Cyn-Day plant, and that Rottinghouse was responsible for loading and securing them. The dispute is whether or not he properly secured before them leaving the GE site. He believed that he did, and Froslear attributed the tilting cylinders to his

failure to do so. Although he did not see Rottinghouse slam on brakes at the gate, Froslear testified that if such a stop occurred, it would and should not have caused the cylinders to lean over had they been properly fastened in the first place. (Jt. Exh. 9.)

5 Testimony of Oestreicher and Perkins

Thus, there was a lot of back and forth among the parties' witnesses about whether or not abrupt braking at the gate or normal driving conditions would or could have caused properly secured cylinders to become loose and lean over.²⁰ The General Counsel's witness, Oestreicher, testified that based on his 21 years of driver experience, it is quite possible and "in the normal routine" for straps on cylinders to work their way down during transport. However, he also stated that the cylinders as depicted at Joint Exhibit 2 were in fact still secure because "[t]hey're not falling over. They're not criss-crossed. They're not anything but standing upright and secure." He also testified that had he driven into the Cyn-Day plant parking lot with similarly leaning cylinders, he probably would not have retied them: "I mean, if it looks out of place, you would re-secure it. But if the bottle is typically leaning a little bit, nothing." (Tr. 174.) I discredit Oestreicher's testimony. His testimony is not reliable as the cylinders on Rottinghouse's truck were clearly not standing upright or properly tied.

20 Perkins, also an Airgas driver at the Cyn-Day plant, testified cylinders such as those on Rottinghouse's truck frequently come loose under the following circumstances:

... if you don't have those straps exactly right on those cylinders the vibration, going down the road, or any kind of shift, it holds—anything will drop those straps. Now, the straps are still around and the cylinders are still secure. But there might be sway in the cylinders ... The cylinders look secure. The straps go around. All I can tell you is that these pallets are not designed to hold three or four cylinders. They are designed to hold 14 cylinders, or 10 or eight. But when you start getting three or four cylinders, and it's hard to secure these cylinders.

(Tr. 186–188). In his opinion, it was "[v]ery common" to have to readjust the straps throughout the day due to normal driving conditions. Like Oestreicher, he did not believe that the cylinders in the photograph appeared to have been in danger of coming completely loose or falling down. Unlike Oestreicher, he admitted that if he had similarly tilted bottles on his truck, he would have straightened and re-strapped them. (Id.) I find that Perkins' testimony was somewhat equivocal in that he admitted that "if you don't have those straps exactly right on those cylinders the vibration, going down the road, or any kind of shift ... anything will drop those straps." In addition, it is clear from Respondent's rules and regulations, that cylinders were to be securely fastened no matter how many or how small they were.

²⁰ There is no dispute, as stated above, that local drivers were required to check and make any readjustments necessary to their loads at each stop.

Testimony of Froslear and MacBride

On the other hand, Froslear and MacBride testified that in the normal course of driving an Airgas truck, it was almost impossible for properly strapped cylinders to shift or tilt. Both testified that the cylinders on Rottinghouse's truck were not properly secured or nested, and at risk of falling. (Tr. 43-47, 195-200, 208-210.) Froslear went to great lengths describing the appropriate nesting technique and how Rottinghouse had not utilized it. (Tr. 43-47.) Froslear also testified that if the cylinders on Rottinghouse's truck were "tilted over in the first place, they are loose," and that going down the highway, it was possible for them to break free of the straps. He explained that the "small cylinder could have easily fell out. Notice at the top, that strap is just at the cap level. That cylinder, that's nothing stopping it at the bottom from slipping down and coming out." (Tr. 36-37.) With some degree of hesitation, he finally admitted that it was not common, but possible for properly secured cylinders to come loose. (Tr. 43-45.)

MacBride testified that "[e]xcessive slamming on brakes could cause moving of cylinders." Initially, he defined excessive braking as "[g]oing 40,50 miles an hour and slamming on the brakes to the point you're almost skidding . . ." He insisted that even then, "[p]roperly strapped cylinders should not move on your truck" under those circumstances. When asked if coming to a sudden stop after accelerating through an open gate from a stopped position would cause properly strapped cylinders to shift, he answered "absolutely not." When asked if improperly strapped cylinders would shift, he said "yes." (Tr. 195-200, 208-209.) He further stated that it would be considered a serious out-of-service DOT violation if caught on the road, of which management and the driver would be fined. In his opinion, "moving cylinders are moving cylinders," no matter whether they are tilted over or freely falling and/or moving inside of a pallet on a truck. The DOT employee would write it up the same way. (Tr. 212.) However, he admitted that it is appropriate to physically inspect cylinders. Moreover, he testified that if he saw a driver with leaning cylinders, he would go find the driver and tell him to fix it. (Tr. 213-214.)

I discredit testimony of Rottinghouse, Perkins, and Oestreicher that properly secured cylinders routinely become loose under normal driving conditions. If this was the case, there would likely have been some evidence of drivers receiving DOT citations or more drivers receiving some type of discipline. Further, I certainly do not believe that Airgas and DOT requirements for drivers to check their loads at each stop only exist because it is common place for appropriately secured loads to become loose. Nor do I find it impossible for properly secured cylinders to become loose under certain conditions. However, I credit MacBride's testimony that stopping suddenly at the gate under the circumstances set forth by Rottinghouse would not have caused properly secured cylinders to tilt. Rottinghouse entered the gate, stopped to open it and began to move through the gate before having to hit his brakes. Although there was no evidence as to Rottinghouse's speed after he reopened the gate and entered the plant yard, I find it implausible that it would have been fast enough such that hard braking would have caused appropriately tied cylinders to loosen and lean over. Therefore, I find it more likely than not, that the cylinders on Rottinghouse's truck were not properly fastened when he left the GE stop.

On the other hand, I discredit Froslear's testimony that he actually saw the cylinders fall or even tilt when Rottinghouse stopped in the yard. His testimony on this point was equivocal, hesitant and largely inconsistent with other statements. He initially testified that he saw the cylinders falling when Rottinghouse pulled into the yard, but on further questioning, admitted that they did not fall, but rather tilted. Further, he failed to mention in his emails to MacBride on August 5 that he saw the cylinders on Rottinghouse's truck move. Instead, he wrote that "[t]his is the way it was when he pulled in after his run." (Jt. Exh. 3.) Moreover, the warning letter stated that Froslear "was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise." When he gave Rottinghouse the warning letter on August 6, he said that he "witnessed SR pulling into the yard, I heard loose cylinders rattling and when SR came to a stop saw them move, fall forward." (Jt. Exhs. 1, 7.) It is my opinion that more likely than not, as set forth in the warning letter, Froslear did not see that the cylinders were loose and tilted until after Rottinghouse parked in the yard. Thus, I find that he fabricated this part of his story in order to bolster his reasons for issuing the warning letter.

Further, I have discredited Froslear's testimony that he did not see Rottinghouse when they were both near Rottinghouse's truck. Froslear claimed that he did not know where Rottinghouse was, but he certainly knew that he was somewhere on the premises. In addition, he knew to watch through a window to see what Rottinghouse would do next after he (Froslear) finished taking the pictures. I do not believe that it was mere coincidence that he happened to be looking out the window when Rottinghouse was re-securing his cylinders. Moreover, I find that Froslear's actions were incongruent with those of a manager concerned about safety or even about his drivers or Company receiving DOT citations and fines for driving with unsecured loads.

Neither Froslear nor Rottinghouse were entirely honest regarding their versions of events on August 3. However, I find that overall, Froslear was far less credible. I find that Froslear's inconsistent and unbelievable testimony about discipline, misrepresentation about falling cylinders, dishonesty about not seeing Rottinghouse outside near the truck, failure to physically examine the cylinders on the truck and failure to find Rottinghouse and correct the unsecured cylinders support my finding below that he was not credible regarding his real reasons for issuing Rottinghouse's warning letter and not agreeing to reduce it to a verbal counseling or warning.

B. Legal Standards

Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

In cases in which motive is an issue, the Board analyzes 8(a)(4) and (1) violations under the *Wright Line* framework.²¹ The burden is on the General Counsel to initially establish that Respondent's decision to take an adverse action against an employee was motivated, at least in part, by protected Board participation. In order to meet this burden, the General Counsel must show that the employee engaged in activities protected by the Act; the employer was aware of the activity; and the activity was a motivating factor in the employer's adverse decision. Once the General Counsel has met its initial showing sufficient to support an inference that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to that it would have taken the same action even in the absence of the protected conduct.

(Id.)

The Board will consider circumstantial as well as direct evidence to infer discriminatory motive or animus, such as: (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (3) disparate treatment in implementation of discipline; (4) inappropriate or excessive penalty; and (4) employer's shifting or inconsistent reasons for discipline. *CNN American, Inc.*, 361 NLRB No. 47 (2014) (citing *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011).

C. The Initial Burden Was Met

Here, it is undisputed that Rottinghouse engaged in Board activity protected by Section 8(a)(4) of the Act when he filed prior charges with the Board on May 14 and on July 7. There is also no genuine controversy that the Board processed and investigated these charges until they were resolved in September (see above). Although Respondent indicates in its Brief that it was not aware of Rottinghouse providing affidavits in these cases, it is clear from the evidence that the Board conducted investigations in each of them. In the first, both Froslear and Luehrmann provided affidavits, and I seriously doubt that the Board would have decided not to elicit testimony from the Charging Party. As for the latter, it is clear that the Board conducted a thorough investigation, and there is no evidence that the Charging Party and Respondent's management officials did not participate in that investigation. (GC Exhs. 2-3; Jt. Exhs. 6-7.) Therefore, I find that Respondent not only knew that Rottinghouse filed charges under the Act, but also should have known that he participated in Board investigations of those charges. I have also credited testimony that Froslear participated in an August 5 grievance meeting regarding the suspension made the basis of Rottinghouse's July 7 charge.

The only element left for me to determine is whether or not the General Counsel has established a *prima facie* case of animus. First, I find that the timing of the warning in this case is suspicious, in that it closely followed Rottinghouse's second charge in Case 09-CA-155497 by only 1 month. I dismiss Respondent's argument that timing here is not determinative

²¹*Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). See also, *Newcor Bay City Division*, 351 NLRB 1034 fn. 4 (2007); *Verizon*, 350 NLRB 542, 546-547 (2007); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

because Rottinghouse's filed his first charge in Case 09-CA-152301 almost three months prior to issuance of his warning letter. (R. Br. at 10-11.) The investigation in that case was ongoing as evidenced by the affidavits of Froslear and Luerhmann, signed and sworn before the Board agent on July 13, and as previously discussed, did not close until September. Further,

5 Respondent's reliance on *M&G Convoy*, 287 NLRB 1140, 1144-1145 (1991), on this point is misplaced. In that case, the Board affirmed the judge's determination that there was no "credible evidence" that Respondent took any adverse action based on the charging party's protected activity. That decision was based on factual findings that although the deciding official generally knew about the charging party's protected activity, he was not involved or

10 implicated in any of the incidents "which could fairly give rise to an inference of animus." Here, Froslear was involved, and the implicated official in both of Rottinghouse's charges, as well as the deciding official in connection with his suspension. Further, although the Region dismissed Rottinghouse's most recent charge regarding his 3-day suspension, this did not occur until almost two months after issuance of his letter of warning. Finally, in *M&G Convoy*,

15 supra, the judge placed emphasis on the fact that timing was the primary basis for showing motive. Such was not the case here.

In addition to timing, I find that Froslear's actions on August 3 demonstrate a complete lack of concern for safety, which is in direct contrast to his testimony about the main reason

20 that he issued Rottinghouse a warning letter. Most striking is his failure to locate Rottinghouse and address the conditions of the cylinders on Rottinghouse's truck immediately after he discovered that they were not securely fastened. Froslear's failure to attempt to promptly correct what he described in testimony as an extremely dangerous situation, along with his overall dishonesty discussed above, leads me to doubt his real motive in disciplining

25 Rottinghouse. He and MacBride gave pretty detailed testimony about how improperly secured and/or nested cylinders posed such great risk of danger to the public. They claimed that the improperly loaded cylinders, as they appeared in Joint Exhibit 2, were at risk of falling down and off of Rottinghouse's truck. In fact, MacBride admitted that had he discovered the tilted cylinders, he would have tried to find the driver to correct them. I do not disagree that

30 unsecured cylinders pose a potential risk of harm to the driver and others. However, I take great issue with the fact that Froslear allowed Rottinghouse to get out of his truck and go inside the facility without looking for him, while he was "concentrating" on getting his camera and taking a picture of the cylinders on the truck. (Tr. 39-41.) Next, he took pictures, but did not attempt to physically examine the cylinders to see if they were loose, movable or making noise

35 when moved. Nor did he physically examine them to see how loose they or the straps around them were. Then, he went back inside the plant, and stood idly by, apparently watching to see what Rottinghouse would do next. Froslear also testified that he would not have let a driver return to the road with unsecured cylinders. However, his conduct suggests otherwise. There is no evidence which leads me to believe that, had Rottinghouse not straightened and re-

40 secured the cylinders on his truck, Froslear would have run out to make him do so before he returned to the road.

Although counsel did not ask how Froslear could tell from a window inside the plant that Rottinghouse had properly nested and secured cylinders, it is implausible that he would

45 have been able to even make that assessment without going out to the truck, and looking at and/or physically examining them. In addition, given that Froslear described in such detail how Rottinghouse had not nested the cylinders, it is surprising that he never mentioned anything

about nesting in his emails to MacBride, the warning letter or any of the subsequent meetings with Rottinghouse and the union representatives. He did not even require, in the warning letter, that Rottinghouse review training on securing or loading cylinders.

5 I have also discredited Froslear's testimony that he did not see Rottinghouse when they were both near Rottinghouse's truck. Overall, in my opinion, Froslear demonstrated that he was out to get Rottinghouse, and therefore more intent on catching and punishing him for reasons other than ensuring public safety or protecting Airgas from liability.

10 Regarding disparate treatment or departure from established discipline procedures, and contrary to Froslear's testimony, there is evidence that at least two other employees received verbal counselings for more serious DOT violations. I find that this departure, his inconsistent testimony regarding established discipline policy, as well as other factors leading to diminished credibility, create an inference of animus. His testimony regarding what he told employees in
15 the April safety meetings was inconsistent with his Board affidavit testimony and with that of Luehrmann. He testified that he was establishing new discipline policy going forward, but the record shows that Respondent issued verbal counseling to employee Edger Reed in November 2013 for talking on the phone while driving—an infraction for which Reed and Respondent could have been subjected to large fines. I discredited Froslear's testimony that this was not a
20 serious DOT violation, and found it alarming that he would not have considered a commercial truck driver driving along the highways while talking on the phone a serious DOT violation. It is certainly as potentially dangerous as a truck driving with slightly leaning cylinders, and both are DOT violations. Therefore, I find that Respondent departed from its stated policy for issuing written and verbal warnings. In addition, employee Jeffries received a verbal warning
25 for a major preventable backing accident.

In that vein, Respondent denies disparate treatment on its part since it treated Rottinghouse and Huff the same in issuance of discipline. Huff received a written counseling and Rottinghouse a written warning, both deemed to be equal in magnitude. Froslear testified
30 that the leaning cylinders on Rottinghouse's truck were just as dangerous as those on employee Huff's truck in 2011, in that they were at risk of coming completely loose and falling. As stated, Huff's cylinders included one fallen on its side, another pallet of liquid filled bottles with only one strap and another unsecured pallet. (GC Exh. 4, p. 1.) It is clear to me that the cylinders on Huff's truck posed a much greater risk of danger than those on Rottinghouse's
35 truck. In fact, Respondent must have believed that to be the case since it mandated Huff to review DOT/Safecor and driver requirements for securing cylinders with his supervisor and ride with the driver trainer. In contrast, as mentioned earlier, Respondent only directed Rottinghouse to "take personal responsibility for creating and maintaining a safe environment,"
40 to properly secure cylinders and follow other DOT/safety procedures.

I do not believe Froslear's testimony that he issued the warning letter as a form of progressive discipline. It was not a stated reason in the warning letter nor was it mentioned during the September 2 discipline meeting. In fact, Froslear's suspension was not noted at all. Instead, the first time that Froslear brought up Rottinghouse's first offense was during the
45 second grievance meeting on September 23, and then only in response to Butts' claim that Rottinghouse believed he should have received a verbal warning since it was his first offense. If this was a sincere basis for issuing the discipline, I find that it would have been included in

the warning letter and confirmed during the August 6 discipline meeting. Moreover, during the September 2 grievance meeting when Perkins told Froslear that Rottinghouse's warning should have been a verbal pursuant to CBA Article 22, Froslear responded that the contract necessitated a written warning notice for an employee's violation. This was not only
 5 inconsistent with other evidence that Respondent did not follow article 22 to the letter, but it was also contrary to Respondent's reducing employee Reed's discipline to a verbal counseling and Respondent's other reasons for issuing the warning letter—progressive discipline and the severity of the infraction. There is no doubt from the evidence presented, that Respondent had an established practice of issuing both verbal and written warnings, in writing and
 10 undocumented for various types of rule violations.

Finally, Froslear's out to get you attitude towards Rottinghouse is also supported by his email to MacBride, insistence that MacBride find the "strongest language" about securing cylinders and failure to conduct a meaningful investigation, as well as his made up story about
 15 seeing falling cylinders.

I have considered all of the arguments and case law offered by the General Counsel²² and Respondent, even that not specifically mentioned in this decision. Regarding Respondent's arguments regarding the omission of settlement agreement and pre-settlement conduct
 20 connected with his charge/Case 09-CA-152301, I find they are misplaced here. (R. Br. at 11-15.) The cases cited do not involve similar circumstances as in this case, and there is no need to engage in a detailed discussion of them. Moreover, the prior charge and pre-settlement conduct was only used in this case as evidence in connection with protected activity and credibility.²³ The Board has held that settlement agreements do not preclude consideration of
 25 pre-settlement statements or conduct as evidence shedding light on a respondent's subsequent discipline of a charging party. See *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995) (evidence of presettlement conduct admissible as background for respondent's motivation).

Therefore, based on the evidence as a whole, I conclude that the General Counsel has
 30 met its initial burden of persuasion under *Wright Line* of showing through sufficient circumstantial evidence that Respondent's motivation for the written warning was motivated by his disdain for Rottinghouse's repeated charge filings with the Board.

D. Respondent Failed To Meet Its Burden Of Showing That It Would Have Disciplined Rottinghouse In The Absence Of His Protected Activity

First, I find that such shifting and inconsistent rationales, and incredibility, as set forth above support a finding that Froslear's reasons for disciplining Rottinghouse are pretextual. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014) (shifting reasons for an employer's
 40 adverse actions are not only persuasive evidence of discriminatory motive, but also serve as

²² I dismiss the General Counsel's argument that the 3-day delay in issuing Rottinghouse's warning letter inferred animus, as I previously found that it was not unusual for Respondent to issue discipline several days after an offense occurred.

²³ As evidenced in this decision, I have dismissed Respondent's argument that Froslear's hearing and Board affidavit testimony in Case 09-CA-152301 was consistent; rather, it was anything but and raised suspicion about Froslear's motivation in this case. (R. Br. at 11-15.)

evidence of pretext); *Approved Electric Corp.*, 356 NLRB 238 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (“Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.”).

Moreover, my findings thus far regarding the factors leading to animus also undermine the Respondent’s ability to rebut the General Counsel’s prima facie case of unlawful discipline. Accordingly, I conclude that under a *Wright Line* analysis, the Respondent violated Section 8(a)(4) and (1) by issuing Rottinghouse a letter of warning.

Conclusions of Law

1. Respondent, Airgas USA, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing Charging Party, Steven Wayne Rottinghouse, Jr., a written warning on August 6, 2015, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(4) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall make Rottinghouse whole by expunging from its files any reference to the unlawful letter of warning dated August 5, 2015, and issued to him on August 6, 2015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

Order

The Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing discipline to employees, or otherwise discriminating against them, for giving affidavits, filing charges or otherwise participating in the National Labor Relations Board process.

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.


2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful letter of warning, and within 3 days thereafter notify him in writing that this has been done and that the letter of warning will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to its employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 2015, the date of the letter of warning.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. July 7, 2016


Donna N. Dawson
Administrative Law Judge

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discipline employees or otherwise discriminate against them because they have provided an affidavit, filed a charge or otherwise participated in the National Labor Relations Board process.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, within 14 days from the date of this Order, rescind and remove from our files any and all references to the letter of warning dated August 5, 2015 and issued on August 6, 2015, to Steven Rottinghouse, Jr. and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the letter of warning will not be used against him in any way.

AIRGAS USA, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-158662 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AIRGAS USA, LLC

and

STEVEN WAYNE ROTTINGHOUSE, JR.

Case 09-CA-158662

**ORDER TRANSFERRING PROCEEDING TO
THE NATIONAL LABOR RELATIONS BOARD**

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., July 7, 2016.

By direction of the Board:

Gary Shinnors

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **August 4, 2016**.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Airgas USA, LLC and Steven Wayne Rottinghouse, Jr. Case 09-CA-158662

June 13, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On July 7, 2016, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

I.

The Respondent sells and distributes industrial gases from several facilities, including one in Cincinnati, Ohio (the Cin-Day plant). The Respondent employs commercial drivers who drive trucks with attached trailers to transport cylinders of those gases to and from the Respondent's customers. The drivers generally are responsible for properly securing the cylinders in the trailers so they do not rattle or shift during transport.³

Steven Rottinghouse, Jr. was one of the Respondent's commercial drivers. As further described below, the

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's determination that the Respondent violated Sec. 8(a)(4) and (1) of the Act when it issued a written warning to employee Steven Rottinghouse, Jr., we find it unnecessary to pass on her analysis of the Respondent's rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). We find the judge's animus analysis and her credibility findings clearly establish that the Respondent's reasons for issuing a written warning as opposed to a verbal warning were pretextual. As a result, the Respondent has failed by definition to show that it would have taken the same action absent Rottinghouse's protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). Where, as here, pretext is found, "there is no need to perform the second part of the *Wright Line* analysis." *Id.*

³ There are instances in which other employees first secure the cylinders inside a container referred to as a "cradle," which is then loaded onto a driver's trailer. In those instances, the driver is not responsible for securing the cylinders inside the "cradle," but must ensure that the "cradle" is secure.

Respondent issued a written warning to Rottinghouse on August 6, 2015,⁴ for driving his truck with improperly secured gas cylinders in his trailer. The General Counsel alleges, however, that the Respondent's real motivation for issuing that discipline was Rottinghouse's past filing of unfair labor practice charges. The judge agreed, and so do we.

II.

In May, just a few months preceding his August 6 discipline, Rottinghouse filed an unfair labor practice charge alleging that the Respondent had threatened to change employees' terms and conditions of employment because Rottinghouse had filed grievances and filed charges with the Board. In July, Rottinghouse filed another charge alleging that the Respondent had given him a 3-day suspension in June in retaliation for engaging in protected union activities and for filing Board charges.

On August 6, while the Region was investigating both of those charges, the Respondent gave Rottinghouse the written warning at issue in this case, based on an incident that had happened on August 3. On August 3, after Rottinghouse had returned to the Respondent's facility after spending the morning collecting gas cylinders, one of the Respondent's operations managers, Clyde Froslear, noticed that the cylinders in Rottinghouse's trailer were tilting and improperly secured. Froslear made no effort to speak with Rottinghouse but, instead, went inside the facility, grabbed his camera, and returned to the truck where he took pictures to document the unsecure load. He made no attempt to inspect the cylinders, secure them, or direct Rottinghouse to do so.

Having seen Froslear taking photos, Rottinghouse returned to his truck to see what Froslear was looking at. The pair made eye contact, but neither said anything, and Froslear returned inside. Froslear then proceeded to watch Rottinghouse from the window of the facility, where he saw Rottinghouse climb onto the back of his truck, secure the leaning cylinders, and drive off. Although Froslear testified that if he saw a "serious safety issue" such as this, he would ensure that it was corrected before the driver left the lot, Froslear made no attempt to speak with Rottinghouse about the safety issue on that day.

The next day, Froslear emailed the Respondent's driver trainer, Mark MacBride, a photograph of the leaning cylinders, asking, "What do you think about this? Look good to you?" MacBride responded, "No. With the cylinders being offset, we would be hit for an insecure load just by how it looks. Where is this truck?" Froslear answered, "Cin-Day." MacBride then asked if the driver

⁴ All dates are in 2015 unless indicated otherwise.

caught it before leaving. Rather than answer this question, Froslear wrote “I saw it when he pulled into the yard.” When MacBride again asked if it was fixed before leaving, Froslear did not reply that the cylinders had been secured, but instead answered, “This is the way it was when he pulled in after his run.” MacBride emailed, “Unacceptable.” Froslear then wrote, “Where would I find the strongest language about load securement that drivers are trained to?” MacBride told him to look in the driver training manual.

In a disciplinary meeting on August 6, the Respondent gave Rottinghouse a written warning for having improperly secured gas cylinders in his trailer on August 3. During that meeting, and two subsequent grievance meetings in September, Rottinghouse argued that he should only have received a verbal warning. During the last grievance meeting on September 23, a union representative asked that Rottinghouse’s discipline be lowered to a verbal warning because it was Rottinghouse’s first offense. Froslear responded that it was not Rottinghouse’s first offense. Later in the meeting, the representative again asked if Froslear would reduce the written warning to a verbal warning, and Froslear said, “No because it is not Steve’s first DOT violation and because of the severity of the event.”

As stated, the General Counsel alleges, and the judge found, that the Respondent issued Rottinghouse a written warning for the August 3 incident in retaliation for Rottinghouse having filed charges with the Board. For the reasons set forth in the judge’s decision and as further explained below, we also agree, contrary to our dissenting colleague, that the written warning was unlawful.

III.

The judge found, and it is not disputed, that Rottinghouse’s filing of unfair labor practice charges was protected activity and that the Respondent knew about the filings. Therefore, the judge appropriately focused her analysis on whether the General Counsel showed that the Respondent had animus toward employees filing Board charges.⁵ In a detailed decision, the judge found that the evidence as a whole demonstrated that the Respondent was motivated by its disdain for Rottinghouse’s repeated charge filings when it issued him the written warning.

⁵ See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011) (“The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole”) (citations omitted).

She further found that the reasons the Respondent gave for the discipline were pretextual.⁶

In finding unlawful motivation, the judge first found that the timing of the warning was suspicious. It occurred during an ongoing Board investigation of allegations that Froslear had unlawfully threatened employees with more serious discipline because of Rottinghouse’s unfair labor practice and grievance filings, and not long after Froslear and Cin-Day plant manager David Luehrmann gave affidavits before the Board on July 13.⁷ Second, the judge found that Froslear’s actions contradicted his purported concern for safety—the reason he gave for issuing Rottinghouse the warning letter.⁸ Third, the judge found evidence of disparate treatment that further demonstrates animus. She explained that at least two other employees received an oral counseling for more serious Department of Transportation violations.⁹

⁶ Pretext also supports a finding of animus. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

⁷ We disagree with our dissenting colleague that the judge erroneously relied on timing to support her animus finding. The sequence of relevant events shows that, at the time the Respondent disciplined Rottinghouse, the Region was actively investigating two charges filed by him, only 3 weeks had passed since the Respondent’s managers Froslear and Luehrmann gave affidavits pursuant to the first charge, and only a month had passed since Rottinghouse filed his second charge. See *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 4 (2016) (animus found in Sec. 8(a)(4) allegation based on timing of discipline imposed within weeks of a Board hearing, which took place over 3 months after charge was filed), *enfd.* 713 Fed.Appx. 152 (4th Cir. 2017). See also *Bates Paving and Sealing*, 364 NLRB No. 46, slip op. at 3–4 (2016), and cases cited therein (noting that a discharge occurring 2 months after an employee gave testimony adverse to his employer suggests unlawful motivation and that an employer may wait for a pretextual opportunity to discipline an employee).

⁸ If Froslear was concerned about safety after noticing that the cylinders were unsecured, why would he leave the area to obtain a camera rather than seek out Rottinghouse or wait by the truck until Rottinghouse returned? Froslear’s actions suggest that he was instead focused on catching Rottinghouse in an infraction and creating a record against him rather than correcting the problem. And even when Rottinghouse returned to his truck and the two made eye contact, Froslear left without comment and retreated to his office – despite this being the obvious opportunity to identify the problem that needed correction. Contrary to the dissent, it was not “objectively logical” for Froslear to assume that Rottinghouse would observe him taking pictures, notice the deficiency, and correct it without Froslear saying anything, or even waiting until the canisters were secured. It is equally implausible that—were safety Froslear’s true concern—he would have returned inside to “wait and see” whether Rottinghouse would secure the cylinders before continuing his runs. Thus, despite Froslear’s testimony that he would not have allowed a driver to return to the road with a “serious safety issue” without first ensuring that it had been corrected, his actions prove otherwise. Indeed, as the judge found, what Froslear’s actions showed was that “he was out to get Rottinghouse, and therefore more intent on catching and punishing him for reasons other than ensuring public safety . . .”

⁹ Our colleague argues that the evidence “falls far short of proving a blatant disparity;” however, “blatant disparity” is not the standard for finding animus from disparate treatment. To be sure, evidence of “bla-

Fourth, the judge rejected the Respondent's claim that the written warning was issued as the next step of progressive discipline.¹⁰ Fifth, the judge found that Froslear's "out to get you" attitude was supported by his email to MacBride seeking the "strongest language,"¹¹

tant disparity" will support a prima facie case of discrimination, but it is not necessary to support such a finding. See, e.g., *Sears, Roebuck & Co.*, 337 NLRB 443, 443-444 (2002) (observing that "blatant disparity" may establish unlawful animus, but instead relying on the record as a whole, including timing, disparate treatment, and other factors, to find such animus); *Aliante Gaming, LLC d/b/a Aliante Casino and Hotel*, 364 NLRB No. 80, slip op. at 1 fn. 3 (2016) (finding that disparate treatment, among other factors, supported a finding of animus).

¹⁰ Froslear's suggestion, echoed by the Respondent, that Rottinghouse's prior offense played a role in the written warning was disingenuous, at best, because the record establishes that it did not. It was not referenced in the warning letter or the first grievance meeting; it was referred to at a later meeting only in response to a question. Further, Froslear's suggestion contradicts his other statements that there was no verbal warning option. We find that that these inconsistent and shifting explanations for issuing the written warning support both a finding of animus and that the Respondent was providing pretextual reasons for the written warning. See, e.g., *See Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), enf'd. mem. 976 F.2d 744 (11th Cir. 1992).

We disagree with our colleague's statement that the judge made a "clear error" in stating that Froslear testified that he issued the written warning as a form of progressive discipline. In response to the question about whether the written warning was issued "because of progressive discipline," Froslear stated, "I mentioned to him that it wasn't his first offense."

¹¹ We disagree with our colleague's characterization of Froslear's hearing testimony as providing a reasonable explanation for his asking for the "strongest language" about securing cylinders. Rather, we find that testimony—where Froslear tried to paint his inquiry as an effort to better teach drivers—to be disingenuous and are not surprised the judge did not specifically address it as it was clearly "not reliable or trustworthy." Though the Respondent did include in its written warning that "cylinders must be strapped, chained or secured to the vehicle so that they do not rattle," it did not "teach" Rottinghouse how to secure the cylinders. Indeed, Froslear did not even speak to Rottinghouse when they made eye contact when Rottinghouse returned to his truck. Nor did the Respondent require further training from him as it had with another employee who was disciplined for driving with unsecured loads. Thus, we find this testimony to be further evidence of the Respondent's inconsistent and shifting explanations for the written warning, and, therefore, further support for the judge's animus finding. See *Lucky Cab*, supra 360 NLRB at 274.

Additionally, we find that Froslear's evasiveness with MacBride on August 5 supports the judge's finding that Froslear had an "out to get you attitude." In his emails, Froslear did not directly answer MacBride's questions as to whether the tilting cylinders were caught by the driver or fixed before the truck left the plant, even though Rottinghouse had indeed secured the cylinders before leaving. This evasiveness occurred right before Froslear asked for the "strongest language," and it adds further context to the "strongest language" request. We find that the whole interaction with MacBride shows suspect behavior by Froslear, which when combined with the record as a whole, provides a clear picture of Froslear's "out to get you" attitude and strong evidence of the Respondent animus toward Rottinghouse's protected activity of filing charges.

by its failure to conduct a meaningful investigation,¹² and by false testimony provided by Froslear regarding the falling cylinder.¹³

The judge also found, with clear record support, that Froslear was not credible regarding his real reasons for issuing Rottinghouse the warning letter. The judge stated, "I find that Froslear's inconsistent and unbelievable testimony about discipline,¹⁴ misrepresentation about falling cylinders, dishonesty about not seeing Rottinghouse outside near the truck,¹⁵ failure to physically examine the cylinders on the truck¹⁶ and failure to find Rottinghouse and correct the unsecured cylinders¹⁷ support my finding . . . that he was not credible regarding his real reasons for issuing Rottinghouse's warning letter and not agreeing to reduce it to a verbal counseling or warning."

For all of those reasons, we agree with the judge that the evidence as a whole shows that the Respondent was not credible in explaining why it gave Rottinghouse a written warning as opposed to an oral warning, and we find that the reasons it did give were a pretextual attempt to mask the Respondent's unlawful motivation, which was based on animus toward Rottinghouse's Board activity. Therefore, as we found above, the Respondent has failed by definition to show that it would have taken the

¹² Froslear made no attempt to physically examine the cylinders in Rottinghouse's truck to determine if they were at risk of moving. Nor did Rottinghouse make any attempt to speak to Rottinghouse about the cause of the issue, his concerns about the unsecured load, or how to fix it, despite having numerous opportunities to do so. Rather, Froslear merely watched through his office window as Rottinghouse corrected the problem. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998) ("The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are clear indicia of discriminatory intent."), enf'd. 201 F.3d 592 (5th Cir. 2000).

¹³ Froslear testified that he saw the cylinders falling, and later clarified his testimony to state that they had just tilted, but, in fact, the judge found that Froslear never saw the cylinders move at all.

¹⁴ Froslear falsely stated that he was not familiar with an oral warning given to employee Jeffries for a vehicle backing accident. He also gave "incredulous" testimony where he stated that he did not consider a commercial driver talking on the phone while driving to be a serious Department of Transportation infraction, despite that it could have subjected the driver to a \$2570 fine and the Respondent to an \$11,000 fine.

¹⁵ When asked by the General Counsel if he talked to Rottinghouse after noticing the leaning cylinders, Froslear testified, "I didn't know where Mr. Rottinghouse was at." This, however, was not true. As the judge found, "[Froslear] certainly knew he was somewhere on the premises," and "he knew to watch through a window to see what Rottinghouse would do next."

¹⁶ Froslear testified that he did not have to physically touch the cylinders because he saw them move; however, as the judge found and as noted above, Froslear never saw the cylinders move.

¹⁷ As the judge detailed, and as we noted above, Froslear's actions on August 3 demonstrated a lack of concern for safety.

same action absent Rottinghouse's filing of charges with the Board.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 13, 2018

Mark Gaston Pearce,	Member
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Lauren McFerran,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

The Charging Party in this case, Steven Rottinghouse, Jr., failed to secure gas cylinders on his truck, which was a serious violation of Department of Transportation (DOT) and company safety policies. The Respondent, Airgas USA, LLC, gave Rottinghouse a written warning. Even Rottinghouse admits that discipline was warranted, but he claims that he should have only received a verbal warning. However, the judge found that the Respondent's Operations Manager, Clyde Froslear, had a "complete lack of concern" for safety and was "out to get Rottinghouse," using the cylinder incident as a pretext to discipline him "for reasons other than ensuring public safety or protecting Airgas from liability." My colleagues agree with the judge, and find that the written warning violated Sections 8(a)(4) and (1) of the National Labor Relations Act (the Act), which prohibit retaliation based on the filing of unfair labor practice charges and participation in NLRB proceedings.

I believe my colleagues and the judge are incorrect, and their finding of a violation is unsupported by a preponderance of the record evidence. In my view, the record supports the Respondent's contention that its sole motivation for the warning was Rottinghouse's failure to properly secure the gas cylinders in his truck. The contrary finding by my colleagues and the judge is based on unwarranted inferences and the subjective judgment regarding what they believe the Respondent's safety procedures and disciplinary policy should be. Accordingly, I respectfully dissent.

Facts

The Respondent sells and distributes industrial gasses from a facility in Cincinnati, Ohio (the "Cin-Day plant"). Operations Manager Froslear oversees several of the Respondent's facilities, including the Cin-Day plant. David Luehrmann is the Cin-Day plant manager. Charging Party Rottinghouse is one of the Respondent's commercial drivers and a member of the Teamsters Ohio Local 100 (the Union) that represents the drivers.

Prior to the discipline at issue in this case, Rottinghouse had filed two unfair labor practice charges with the Board. On May 14, 2015,¹ he filed a charge in Case 09-CA-152301. This charge was ultimately resolved by an informal settlement agreement approved by the Regional Director for Region 9 on September 3.² On July 7, Rottinghouse filed a charge in Case 09-CA-155497 alleging that the Respondent retaliated against him for engaging in protected concerted activities and for filing Board charges when it suspended him for 3 days on June 22 for dishonesty and a deliberate violation of DOT policy by completing paperwork off the clock. This was his first discipline while working for the Respondent. The Regional Director dismissed the charge on September 22. The General Counsel's Office of Appeals denied Rottinghouse's appeal of the dismissal on November 5, stating in part that "there was no objective evidence of hostility linking the Employer's decision to your participation in Board proceedings."

The incident giving rise to this case occurred on August 3. Rottinghouse drove his truck that day on a route that included several stops to pick up empty cylinders at a General Electric plant. The credited testimony establishes that Operations Manager Froslear was in the Cin-Day plant parking lot when he observed Rottinghouse's truck return to the plant yard and heard a rattling noise. Froslear inspected the parked truck and subsequently took one or more cell phone pictures of a group of cylinders on a pallet in the back of the truck. Froslear did not get onto the truck bed to physically inspect or touch the cylinders. One picture he took was introduced into the record. It shows a row of three large cylinders with a single smaller cylinder in front. All cylinders are tilted 10 to 15 degrees. Two straps surround the cylinders, the lower of which is apparently loose. Having a load of cylinders stacked in this manner and not properly secured to prevent leaning or coming completely loose undisputedly violates DOT safety regulations and Airgas policy.

¹ All dates hereafter are in 2015, unless otherwise specified.

² Allegations of Sec. 8(a)(3) and (4) violations in this charge were previously withdrawn on August 20. The settlement agreement did not contain a nonadmissions clause and required the Respondent to post a remedial notice.

Rottinghouse saw Froslear taking pictures by the truck. Although Rottinghouse credibly testified that the two men saw each other, neither of them spoke.³ Froslear returned to his office after taking the pictures. Looking out a window, he observed Rottinghouse rearrange and properly secure the cylinders in an upright position before driving out of the yard. Froslear testified that if he saw a “serious safety issue” such as this, he would ensure that it was corrected before the driver left the lot.⁴

On the morning of August 4, Froslear emailed a photo of the cylinders in Rottinghouse’s vehicle to Mark MacBride, the Respondent’s driver trainer, and asked, “What do you think about this? Look good to you?” MacBride replied, “No with the cylinders being offset we would be hit for insecure load just by how it looks.” The two men continued to exchange emails. After Froslear clarified that the condition existed when Rottinghouse pulled into the yard after his run, MacBride stated, “Unacceptable.” Froslear then asked, “Where would I find the strongest language about load securement that drivers are trained to?” MacBride replied, “[i]n the driver training manual.” Rottinghouse was not identified as the driver during this email exchange.

On August 6, Rottinghouse was presented with a written warning for the insecure load photographed by Froslear on August 3. The warning, set forth in full in the judge’s decision, states in relevant part:

On Monday afternoon, 8/3/15, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.

³ As further discussed below, the judge discredited Froslear’s testimony that he saw the cylinders fall or tilt as Rottinghouse drove his truck into the yard and that he did not see Rottinghouse at or near the truck when inspecting and photographing the cylinders. The judge also discredited Rottinghouse’s testimony that a sudden stop as he entered the yard caused the cylinders to shift, and she discredited the testimony of General Counsel’s witnesses that the cylinders were properly secured.

⁴ There is some ambiguity in the record as to whether Rottinghouse drove away immediately after properly restacking and securing the cylinders. Robert Oestreicher, his stepfather and coworker, accompanied him that day on the run to and from the General Electric plant. Oestreicher testified that he went into the Cin-Day plant after the truck was parked. According to him, Rottinghouse came in a few minutes later and said that Froslear was taking pictures of the truck. When Oestreicher asked why, Rottinghouse said “there’s some leaning bottles on the truck at that time. And I [Oestreicher] had mentioned that you’ll probably get a write up.” The judge did not address this part of Oestreicher’s testimony.

You have been trained on the proper way to secure cylinders while being transported. According to the Driver Training Manual, “cylinders must be strapped, chained or secured to the vehicle so that they *do not move or rattle.*” (Italics in original.)

Rottinghouse immediately grieved the discipline pursuant to the collective-bargaining agreement between the Respondent and the Union, asserting that only a verbal warning was warranted under the Respondent’s existing disciplinary policy because the rattling noise was caused by a different group of secured cylinders and Rottinghouse had fixed the leaning cylinders before he left the yard. The parties discussed the grievance on August 6 and in meetings on September 2 and 23, during each of which Rottinghouse and his union representatives unsuccessfully sought to persuade Froslear to reduce the written warning to a verbal warning. During the September 23 meeting, union agent Ron Butts stated that “[Rottinghouse] thinks the warning should be reduced to a verbal since this was his first offense.” Froslear noted that it was not his first offense. When Butts again asked if the warning could be reduced to a verbal one, Froslear stated “[n]o because it is not Steve’s first DOT violation and because of the severity of this event.”

Article 22 of the collective-bargaining agreement between the Respondent and the Union specifically mentions only written warnings and suspensions as discipline. The former remain in an employee’s file for 12 months, and can be used as the basis for progressive discipline during that period; the latter remain on file for 18 months, and can be the basis for progressive discipline during that longer period. Although not mentioned in the parties’ contract, the record undisputedly shows that the Respondent had a progressive disciplinary past practice of issuing only verbal warnings for certain minor first-time offenses,⁵ followed by written warnings for a se-

⁵ On September 4, 2013, employee Hollander received a verbal warning for the first-time violation of leaving grease on the steering wheel and knob of a forklift. On September 6, 2013, employee Carlo received a verbal warning for the first-time violation of failing to wear the proper gloves when filling high-pressure cylinders. On October 13, 2014, employee Perkins received a verbal warning for the first-time violation of not wearing a seat belt when operating a fork lift to load empty cylinders onto his truck. On March 2 and September 21, 2015, respectively, employees Huff and Kinkade received verbal warnings for separate first-time violations of clocking in a few minutes prior to the end of their mandatory off duty period. On March 18, 2015, employee Oestreicher received a verbal warning for violation of a work rule by talking on his cell phone while operating a tow motor.

All of the above warnings were documented on the Respondent’s standard forms. The record also contains a copy of a handwritten verbal warning on blank paper issued to employee Jeffries on May 10, 2012, for an undescribed preventable vehicle backing accident. Plant

cond infraction of a similar kind.⁶ Froslear explained the practice with respect to minor offenses in his April 28 meetings with employees. According to Plant Manager Luehrmann's credited testimony in this proceeding, which was consistent with statements in affidavits given by him and Froslear during the investigation of the charge in Case 09-CA-152301, Froslear used the hypothetical of an employee's failure to wear safety glasses to explain a continuing practice that a manager would first verbally remind the employee to wear them but "[i]f the manager then saw the employee committing the same infraction, the manager would give that employee a written warning."

Neither Article 22 nor the evidence of past practice shows that the Respondent had a progressive disciplinary pattern beginning with a verbal warning for serious offenses. On the contrary, documentary evidence shows that several employees received written warnings for first-time serious offenses.⁷ Further, as previously stated, Rottinghouse's first discipline of any kind during his employment was a 3-day suspension for first-time violation of DOT and Airgas policies by his dishonest and deliberate completion of DOT paperwork while not on duty.

Manager Luehrmann signed the warning. The judge discredited Froslear's testimony that he was not familiar with this warning.

⁶ On November 15, 2011, employee Baker received a written warning because he was observed not wearing safety glasses on consecutive days. On September 6, 2013, employee Hollander received a written warning for not wearing a seat belt when operating a fork lift, a day after he was verbally warned for leaving grease on a forklift.

⁷ On March 10, 2011, employee Huff received a written warning for first-time violation of DOT and Airgas safety policies by carrying a load with one cylinder loose on the truck bed, one pallet of cylinders unsecured, and another pallet of cylinders improperly secured. On June 6, 2011, employee Bowman received a written warning for first-time violation of Airgas backup safety procedures by backing into a car while making a delivery. On May 17, 2012, employee Baker received a written warning for first-time violation of DOT and Airgas policies by failing to provide a complete and correct trip load verification and hazardous material manifest. On October 8, 2012, Baker received a 3-day suspension for violation of the DOT safety requirement that he have a valid medical certificate in his possession while driving his route. On October 28, 2013, employee Reed received a written warning for first-time DOT safety violation by talking on his cell phone while driving. The written warning was reduced on November 12 to a verbal warning. There is no evidence of the circumstances that resulted in this change in discipline. On January 25, 2016, employee Huff received a written warning for a preventable accident when he hit and damaged the side of a customer's building with his truck.

In one other instance, employee Haynes received a written warning on January 28, 2014, for two episodes of failing to follow proper pre-filling inspection process, resulting in an operational loss of \$2500 in November 2013 and of \$2000 on January 24, 2014. There is no evidence of separate discipline for the earlier episode.

The Judge's Decision

The judge found that the Respondent acted out of animus against Rottinghouse for filing charges and participating in the Board's investigation of them, and that Froslear seized upon the cylinder safety issue as a pretext for issuing a written warning. She relied on inferences drawn from circumstantial evidence to find both animus and pretext. Specifically: (1) she found the timing of the warning, issued a month after Rottinghouse filed the charge in Case 09-CA-155497, and about 3 weeks after Froslear and Luehrmann gave Board affidavits relevant to the prior charge filed in Case 09-CA-152301, to be "suspicious"; (2) she found that Froslear's actions on August 3 demonstrated "a complete lack of concern for safety," and that language in his August 4 email exchange with MacBride further demonstrated his "out to get you" attitude; (3) she found that Froslear's written warning represented disparate treatment and a departure from the Respondent's disciplinary policy because two other employees (Reed and Jeffries) received only verbal warnings for what she deemed to be more serious offenses; and (4) she found that Froslear offered shifting and inconsistent rationales for the written warning.

Having found that the Respondent's reasons for issuing the written warning were pretextual, the judge summarily concluded that the Respondent necessarily failed to show it would have imposed the same discipline in the absence of Rottinghouse's protected activity.

Discussion

The *Wright Line* motivational test for discriminatory discharge and discipline allegations requires that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).⁸ A critical element of this initial showing is proof of animus against the protected activity at issue.⁹ *Id.* Under certain circumstances, in the ab-

⁸ The Board has held that the *Wright Line* motivational test, originally stated for analysis of allegations of Sec. 8(a)(1) and (3) discrimination, also applies to allegations of Sec. 8(a)(4) discrimination. See, e.g., *Parker Laboratories, Inc.*, 267 NLRB 1174 (1983), *Book Covers, Inc.*, 276 NLRB 1488, 1491 (1985), and *Great Western Produce*, 299 NLRB 1004, 1005 *fn.* 8 (1990).

⁹ The *Wright Line* test also requires that the General Counsel make an initial showing that an employer has knowledge of the alleged discriminatee's protected conduct. It is undisputed that the Respondent's officials knew that Rottinghouse filed separate charges in Cases 09-CA-152301 and 09-CA-155497. The judge inferred from the fact that Froslear and Luehrmann gave Board affidavits in the former case, and from the absence of evidence that Respondent's officials did not partic-

sence of direct evidence, proof of animus may be inferred from circumstantial evidence based on the record as a whole. E.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enf'd. 976 F.2d 744 (11th Cir. 1992). However, I believe the judge erred in finding that the circumstantial evidence in this case warrants an inference that animus against Rottinghouse's protected Board-related activity motivated Froslear to issue him a written warning.¹⁰

It is important to recognize what is undisputed here:

- Rottinghouse failed to properly secure the group of 4 cylinders and drove with them in this condition. This was undisputedly a violation of DOT and Airgas safety policy that risked cylinders becoming completely loose and falling off the truck while on the road.
- Even Rottinghouse did not contest that he was responsible for securing the cylinders and that some form of discipline was appropriate. He contends only that the Respondent should have given him a verbal warning rather than a written one.
- There is no direct evidence of animus borne by Froslear or any other official of the Respondent against the filing of unfair labor practice charges or participation in Board proceedings.
- In addition, there is no credited evidence that the warning was issued against a background of any independent unfair labor practices supporting a finding of animus. The General Counsel does not contend that Rottinghouse's prior 3-day suspension was unlawfully motivated, and the judge specifically found, based on her credibility findings, that Froslear did not threaten on April 28 to change disciplinary policy in response to unfair labor practice charge filings.¹¹

The paragraphs below address each of the factors relied upon by the judge, based on circumstantial evidence, which prompted the judge to find that the General Counsel met the initial *Wright Line* burden and that the Respondent's reliance on Rottinghouse's safety violation was pretextual.

ipate in investigation in the latter, that they should have known Rottinghouse participated as well in Board investigation of both charges. I find no need to pass on this inference, which is unnecessary to the *Wright Line* analysis of the knowledge factor.

¹⁰ Inasmuch as my colleagues essentially reiterate the judge's analysis, there is little need for separate discussion of their opinion.

¹¹ I note that in a subsequent unfair labor practice proceeding involving the same parties, a different judge found that Froslear did make the alleged April 28 threat. *Airgas USA, LLC*, 366 NLRB No. 92, slip op. at 3 (2018). That finding is not a part of the record in this case. Even if it were, I believe this background evidence would be insufficient to support finding that the General Counsel met the initial *Wright Line* burden of proving that animus against Rottinghouse's Board-related activity motivated his August 6 warning.

1. *Credibility findings are not dispositive of the motivational issue.* The Respondent did not challenge any of the judge's credibility findings supporting her finding of discriminatory motivation, even though they were not predominately based on her observation of witnesses' demeanor. Accordingly, I accept the judge's findings that Froslear did not observe cylinders fall or tilt and that he did see Rottinghouse in the vicinity of his truck on August 3 but chose not to speak with him.¹² However, there are limitations on the extent to which credibility findings can prove unlawful motivation associated with an unfair labor practice charge. As the Board long ago stated, "*the question of motivation where an alleged unlawful discharge [or other adverse action] is involved is not one to be answered by crediting or discrediting a respondent's professed reason for the discharge, and thus we cannot accept every credibility finding by a trier of fact as dispositive of that issue. Rather, that question is one to be resolved by a determination based on consideration and weighing of all the relevant evidence.*"¹³

In this case, the judge's finding that Froslear was "out to get" Rottinghouse and seized upon the cylinder incident as a pretext for doing so cannot be reviewed simply as the product of her credibility findings. The Board must instead consider and weigh all of the evidence relevant to the Respondent's motivation.

2. *The timing of the warning was not suspicious.* The judge inferred animus from the fact that Froslear issued the August 6 warning a month after Rottinghouse filed the charge in Case 09-CA-155497 alleging that his 3-day suspension violated Section 8(a)(4) of the Act and about 3 weeks after Froslear and Luehrmann gave Board affidavits relevant to the prior charge filed in Case 09-CA-152301. It is well established that an inference of animus may in certain circumstances be based in part on the timing of discipline relative to an employee's protected activity. The operative word is "may," not "must," and no inference is warranted based on the coincidental sequence of events in this case. The determinative intervening event proximate to the warning was Rottinghouse's own observed and undisputed safety violation in failing to secure the cylinder load 3 days before receiving the warning, not his filing of a charge with the Board a month earlier or the subsequent taking of Board affidavits from company officials.

¹² As discussed below, I would not "affirm" her purported discrediting of Froslear's testimony that he would not have let Rottinghouse leave the yard without fixing the safety problem and that he issued the warning letter as a form of progressive discipline.

¹³ *Charles Batchelder Company*, 250 NLRB 89, 89-90 (1980) (emphasis added).

3. *Froslear's actions on August 3 and 4 were objectively logical.* The judge inferred an intent to punish Rottinghouse for protected conduct from Froslear's "complete lack of concern" for safety. She based this on Froslear's failure to address the unsecured cylinder issue with Rottinghouse directly and immediately, his failure to physically examine the cylinders to see if they were loose, his willingness to watch Rottinghouse from inside the plant, the absence of any evidence that Froslear would have stopped him from driving out of the yard without having properly straightened and resecured the cylinders, and his email inquiry to driver trainer MacBride about where he could find the "strongest language about load securement that drivers are trained to."

The entirety of this part of the judge's analysis is impermissibly speculative and subjective, imposing her own judgment of proper safety procedures on the Respondent without any proof from the General Counsel of their objective necessity or a departure from the Respondent's own past practice. Most egregious was the judge's finding that there was no evidence leading her to believe Froslear's testimony that he would not have let Rottinghouse drive out of the yard without addressing the safety issue. This was total speculation about a hypothetical alternative to what actually took place. There is nothing in this actual factual scenario to suggest that Froslear evinced a lack of concern for safety by waiting a short while to observe what Rottinghouse would do or that he could not see Rottinghouse secure the cylinders from his observation spot inside the plant. Rottinghouse saw Froslear taking pictures and, without Froslear having to speak with him (or Rottinghouse asking Froslear if there was a problem), inspected his load and understood that he needed to straighten and secure the cylinders before driving out of the yard. He credibly testified that he did so. When Froslear saw to his satisfaction that Rottinghouse properly secured the cylinders—again, there is no evidence that he could not see this—there was no reason for him to stop Rottinghouse from driving out of the yard.

There also is no basis for the inference drawn by the judge that Froslear's failure to physically examine the cylinders demonstrated his lack of concern for safety. Froslear undisputedly observed and photographed unsecured cylinders. He did not need to physically examine them to verify this as a safety violation. Instead, he logically sought the expert opinion of driver trainer MacBride, who confirmed a DOT violation and "unacceptable" conduct based solely on his review of the picture Froslear emailed to him. For that matter, coworker Oestreicher testified that, sight unseen, he told Rottinghouse

he would probably be *written up* after Rottinghouse said that Froslear was taking pictures of loose cylinders.

The judge's analysis also suggests that Froslear's "out to get you" attitude towards Rottinghouse is shown by his "insistence" in his August 4 email to MacBride, that the driver trainer find the "strongest" language about securing cylinders. Froslear did not insist on anything. His email inquired where he, not MacBride, could find the "strongest" language. MacBride referred Froslear to the driver training manual, and Froslear quoted appropriate language from it in the warning letter. Moreover, what is irrational or suspicious about a manager asking the company expert on driver training and safety where the manager could find the "strongest language" supporting the expert's opinion that an unidentified driver engaged in the "unacceptable" action of transporting an insecure load? Apparently, the judge subjectively believed that use of the "strongest" modifier exposed Froslear's intent to impose more severe discipline than was warranted, but the record falls woefully short of objectively proving that this must have been so.¹⁴

4. *There was no disparate treatment.* In circumstances where the General Counsel relies on evidence of disparate treatment to meet the initial *Wright Line* burden of proving that discipline was motivated by animus against protected activity, the Board has stated that "evidence of a 'blatant disparity is sufficient to support a prima facie case of discrimination.'" *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998), quoting *Fluor Daniel*, 304 NLRB at 970–971.¹⁵ The evidence here falls far short of proving a "blatant disparity" in giving Rottinghouse a written warning rather than a verbal warning. The

¹⁴ When the General Counsel asked Froslear why he was asking for the strongest language, Froslear answered, "I'm not – since Mark MacBride is a driver's trainer, he's a resource for me as to what are exactly other drivers taught to. I wanted to make sure that I didn't just guess at what the material would have been to address this problem." Asked again why he was looking for the strongest language, Froslear replied, "Key words: 'Nesting, secure, no rattling.' Those types of things. To make sure that when we teach somebody they fully understand, it has to be secure. And secure means a lot of things." The judge did not specifically address this testimony, which seems to provide a reasonable explanation for Froslear's inquiry. Even if she implicitly discredited that testimony, the record does not support drawing a contrary inference that the search for "strongest language" indicated Froslear's intent to impose more severe discipline than was warranted.

¹⁵ My colleagues correctly state that a lesser showing of disparity may suffice to meet the General Counsel's initial *Wright Line* burden of proving animus when viewed in conjunction with other evidentiary factors. As stated in this opinion, I find there is no other credible and objective supporting evidence establishing animus attributable to the Respondent. Moreover, as stated below, I find that the isolated instance of inconsistency in the Respondent's prior disciplinary practice is insufficient to prove *any* significant disparity, much less a blatant disparity that might standing alone meet the *Wright Line* burden.

judge's contrary view suffers from the same speculative and subjective flaws as discussed above.

Rottinghouse received the same written warning for the same safety violation as Huff received in 2011. The judge rejected the notion that the incidents were comparable and deserved the same level of discipline because cylinders were less secure or completely loose in Huff's truck and were only leaning slightly in Froslear's truck. There is not a scintilla of record evidence that the DOT or Airgas makes this distinction in defining what constitutes an unsecure cylinder safety violation or what the disciplinary consequences should be for such a violation. In fact, the only evidence is Froslear's uncontradicted testimony that no distinction is made.¹⁶ Even accepting the judge's unsupported subjective view that the Huff and Rottinghouse violations are distinguishable, the fact is that the Respondent additionally required Hull to review driver safety requirements for securing cylinders with his supervisor and to ride with a driver trainer. Rottinghouse was warned but not required to take any additional remedial training. The judge somehow twists this fact into alleged further evidence of disparate treatment, apparently reasoning that, if the remedial training requirements (*which are not shown to be disciplinary*) were not imposed on Rottinghouse, he should not have received a written warning at all.

The judge also found disparate treatment based on the Respondent's issuance of verbal warnings to two drivers for incidents that she viewed as more serious than Rottinghouse's. She found it "incredulous" that Reed received a verbal warning for talking on the phone while driving, a DOT safety violation that could have resulted in substantial fines for driver and employer. As previously noted, Froslear initially gave Reed a written warning for this incident. Consequently, he and Rottinghouse received the same discipline for a serious safety violation. Reed's discipline was later reduced to a verbal warning a month later. There is no record explanation of the circumstances leading to this reduction in discipline. It was the General Counsel's burden, not the Respondent's, to produce this evidence in support of his prima facie case. Absent such evidence, there is no basis to infer that the failure to make the same reduction in Rottinghouse's discipline was disparate treatment. Moreover, even comparing the written warning given to Rottinghouse to the oral warning ultimately given to Reed,

the judge's finding of disparate treatment rests on her subjective view that Reed's safety violation was more serious than Rottinghouse's. This finding contravenes the well-established doctrine that "[t]he decision of what type of disciplinary action to impose is fundamentally a management function,"¹⁷ and that "Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient."¹⁸

As for the verbal warning issued in 2012 to Jeffries for a preventable vehicle backing accident, the Respondent admits in its brief in support of exceptions that the failure to give him a written warning was a mistake. Indeed, less than a year earlier, the Respondent gave employee Bowman a written warning for a backing accident. Still, the failure to give Jeffries a written warning represents a single incident of inconsistent discipline in record exhibits covering a 5-year period. This incident is not sufficient to prove any real disparity in disciplinary practice, and it cannot possibly suffice to prove the requisite "blatant disparity" in treatment of Rottinghouse's safety violation that would, standing alone, warrant an inference of animus in support of the General Counsel's prima facie case.

5. *Froslear did not offer shifting or inconsistent reasons for discipline.* Froslear did not mention Rottinghouse's prior DOT violation—the one for which he received a 3-day suspension—in the written warning, or in the discussion of that warning and its grievance with Rottinghouse and his union representatives on August 6 and September 2. He had no apparent reason to do so on those occasions, inasmuch as (1) he regarded the failure to properly secure cylinders to be a serious safety violation warranting a written warning even for a first offense, and (2) according to his credited notes of these discussions, no one suggested on Rottinghouse's behalf that the warning should be reduced to verbal because it was a first offense. Union agent Butts raised this argument for the first time during the grievance meeting on September 23. Froslear rejected it, stating "[n]o because it is not Steve's first DOT violation *and* because of the severity of this event." Contrary to the judge, this response, and its reiteration during Froslear's testimony, did not represent either a shifting or inconsistent reason for the writ-

¹⁶ "Q. (General Counsel) And are you saying that a loose 12 cylinder – completely loose, not secure – a pallet with unsecured cylinders and a pallet containing liquid containers only secured with one strap is equal to what Mr. Rottinghouse – to this?"

A. (Froslear) I do. Unsecured is unsecured."

¹⁷ *Neptco, Inc.*, 346 NLRB 18, 20 fn. 15 (2005) (quoting *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977)).

¹⁸ *Id.* at 20 fn. 16 (quoting *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444–445 (5th Cir. 1978)).

ten warning.¹⁹ From August 6 on, including throughout this proceeding, the Respondent has consistently maintained that the written warning was appropriate for the first-time offense at issue. Further, as discussed above, the record shows that the Respondent issued a written warning to Huff for the same DOT safety violation and that it also issued written warnings and even imposed suspensions for other first-time serious safety violations. Froslear's reply to Butts on September 23 represented no shift or inconsistency in the rationale for Rottinghouse's warning. It only refuted Butts' claim, not previously made, that the August 3 unsecured cylinder incident was Rottinghouse's first DOT safety offense.

For that matter, Butts' first offense claim on September 23 at least implicitly suggests his view that a written warning *would be* appropriate for a second DOT safety violation, even if not for a first violation. I note that the Regional Director's dismissal of the charge in Case 09–CA–155497 one day earlier, on September 22, removed any doubt that the suspension of Rottinghouse for a prior DOT violation was lawful.

Conclusion

I believe a review of the entire record shows that Froslear legitimately relied solely on Rottinghouse's serious safety violation when issuing a written warning; but even assuming that the judge correctly found Froslear was "out to get" Rottinghouse, I also believe the General Counsel failed to meet his initial *Wright Line* burden of proving that Froslear was motivated to do so by animus against Rottinghouse's protected recourse to the Board's processes. Under our Act, "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge [or discipline] when the real motivating purpose is to do that which [the Act] forbids."²⁰ Further, "[w]here the employer has proper cause for discharging an employee, the Board *may not rely on scant evidence*

¹⁹ The judge stated that she did not believe Froslear's testimony that he issued the written warning as a form of progressive discipline. This was clear error because Froslear never testified that he did so, even when pressed by the General Counsel and the judge. In response to a leading question from the General Counsel as to whether Froslear told Rottinghouse or Perkins "that this is a written warning because of the progressive discipline policy," Froslear replied, "I mentioned to him that it wasn't his first offense. *And the severity of it warranted a written warning.*" (Emphasis added.) When the General Counsel repeated, "Did you specifically mention progressive discipline," Froslear replied, "I mentioned that this wasn't his first offense." The judge then directed Froslear to answer this question "yes or no." Froslear replied, "Progressive? I don't remember."

²⁰ *Anheuser-Busch*, 351 NLRB 644, 647 (2007); *Taracorp*, 273 NLRB 221, 222 fn. 8 (1984) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)).

and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer."²¹ Though armed with the best intentions, I believe my colleagues and the judge in this case have impermissibly substituted their judgment as to what type of discipline was warranted based on Rottinghouse's deficient performance.

In my view, the record strongly supports the same conclusion here as made by the General Counsel in affirming dismissal of Rottinghouse's charge contesting his prior suspension—specifically, "there was no objective evidence of hostility linking the Employer's decision to your participation in Board proceedings." Accordingly, I respectfully dissent from my colleagues' adoption of the judge's finding that Rottinghouse's written warning was unlawful, and I believe the complaint should be dismissed.

Dated, Washington, D.C. June 13, 2018

Marvin E. Kaplan,

Member

Erik P. Brinker, Esq., for the General Counsel.

Michael C. Murphy, Esq. (Radnor, PA), for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on February 16, 2016. Steven Wayne Rottinghouse, Jr. (Rottinghouse), the Charging Party, filed the charge on August 24, 2015.¹ The General Counsel issued the complaint on November 18. In its December 7 answer, Airgas USA, LLC (Respondent/Airgas) generally denied all alleged violations of the Act.²

The complaint alleges that Respondent violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act) when it issued a written warning to Rottinghouse in retaliation for providing affidavit testimony and filing charges in other cases before the National Labor Relations Board (the Board).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware limited liability company, has been engaged in the retail sale and distribution of industrial gases

²¹ *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955) (emphasis added).

¹ All dates are in 2015 unless otherwise indicated.

² For brevity purposes, counsel for the General Counsel will be referred to as the "General Counsel."

and related products at its office and facility located at 10031 Cincinnati-Dayton Road, in Cincinnati, Ohio (Respondent's facility/Cin-Day plant). In conducting its business during the 12-month period ending on November 1, Respondent derived gross revenues in excess of \$500,000. During the same period, Respondent has also purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Ohio. Respondent admits by stipulation, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. 11.)³

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Airgas management

Respondent has operated its sale and distribution of industrial gases business at its Cin-Day plant for about 8 years. At all relevant times, Clyde Froslear (Froslear) has been Respondent's operations manager over several of Respondent's facilities, including the Cin-Day plant which is central to this case. He oversees all operations including, but not necessarily limited to, production, distribution, safety, labor relations and employee relations. David Luehrmann (Luehrmann) is the Cin-Day plant manager, who directly manages the day-to-day plant activities and employees. Both he and Froslear discipline employees for any safety or other violations, but he generally does so with Froslear's input and approval. There is no dispute that Froslear approves discipline and tries to attend most disciplinary meetings. Along with his managers, he typically signs or initials most discipline.⁴

2. Airgas drivers

Airgas hires drivers to transport various industrial gases on trucks with trailers. These compressed gases are housed in cylinder tanks (also referred to as cylinders, tanks, and sometimes bottles). Drivers must secure them inside metal cages or pallets with straps and ratchets; and fasten them onto the trailers. However, some of the cylinders are preassembled by other employees (assemblers) into 6 or 12-pack cradles (also referred to as packs or banks), and bolted together and secured inside their own cages. The drivers are not responsible for securing the cylinders/tanks inside these cradles, but must make sure that the cradles are properly secured to the trailers. Employees therefore are not disciplined if the cylinders inside these cradles or packs sometimes move or rattle.

According to Froslear and Respondent's driver trainer, Mark MacBride (MacBride), the drivers are supposed to properly "nest" the cylinders (which are not preassembled in 6 or 12-pack cradles) and secure them with two straps so that each one

is nesting tightly against another.⁵ Respondent's drivers are either assigned city routes within a 50-mile radius each way from the plant, or they are assigned long distance routes over 50 miles each way. City drivers must check to make sure their loads are secure at each stop, while long distance drivers must do so at least every 50 miles.

The Department of Transportation (DOT) regulates the manner in which Respondent and its drivers transport and secure cylinders. According to Respondent's driver training manual (revised December 1, 2014), this "means that cylinders must be strapped, chained or secured to the vehicle so that they do not move or rattle." Other relevant parts of this manual require that:

Small cylinders must be secured as well. You cannot transport cylinders if they have the ability to roll around, such as in a box or cage. Special care must be taken when transporting small cylinders. Please work with your supervisor to correct any cylinder transportation problems.

(GC Exh. 6, pp. 3–7.) In various safety meetings, employees viewed several power point presentations on pallet, strap and load handling and securement. Relevant portions of those slides focused on the importance of pallet handling and general hazards associated with it such as loose cylinders falling and unsecured loads during transportation. One of the slides on physical loading and unloading dealt with the use of "proper cylinder nesting techniques" and use of "the back brace when strapping small quantities of cylinders to secure the load." (GC Exh. 6, pp. 7–11, 15–17.)

Respondent also provided employees with safety training on compliance, safety and accountability (CSA) in 2014. Commercial motor vehicle (CMV) drivers, such as Respondent's employees, along with their employers, receive citations and fines during DOT and other law enforcement roadside stops for violating DOT regulations and/or committing one of the "Seven Basics" of CSA. One of those basics is "Cargo Related (Load Securement), under which "[f]ailing to properly secure the load . . ." is listed. (See GC Exh. 6, pp. 5–12.)

3. Charging Party Rottinghouse and his protected activities

Charging party Rottinghouse is one of Respondent's experienced commercial drivers at the Cin-Day plant, who drives both city and longer distance routes. The record reveals that prior to late June 2015, he maintained good safety and driving records, with no DOT or Airgas rule violations. Training records show that he attended and satisfactorily completed the various safety trainings and presentations provided by Respondent, including those described above on proper load securement. (GC Exh. 6.)

Rottinghouse was an active member of the Union. In addition, prior to the underlying charge in this case, he filed two other charges with the Board. In the first, Case 09–CA–

³ Abbreviations used in this decision are as follows: "Tr." for Transcript; "GC Exh." for General Counsel Exhibit; "R. Exh." for Respondent Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's Brief; and "R Br." for Respondent's Brief.

⁴ The parties also stipulated that Froslear and Luehrmann are Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act. (Tr. 11.) The parties' other stipulations are set forth at Jt. Exhs. 1–10.

⁵ MacBride trains new Airgas drivers on policies and safety procedures. He also rides with all drivers, including the experienced ones, each year and reviews policies and procedures dealing with safety, DOT compliance and policy updates. At the end of each trip, he points out any problem areas that drivers need to work on, and documents his review. (Tr. 193–194.)

152301, filed on May 14, 2015, he alleged that in April safety meetings, Froslear threatened to change employees' terms and conditions of employment because of his filed grievances and Board charges. More specifically, at issue were Froslear's comments about disciplinary policy during two April 28 employee safety meetings. Froslear and Luehrmann provided affidavit testimony in that case (on July 13), which was subsequently resolved on September 9, 2015. (Jt. Exh. 5; GC Exh. 2).⁶ In the second, 09-CA-155497, filed on July 7, 2015, he alleged that Respondent suspended him for 3 days in retaliation for protected union activities and filing charges with the Board. Respondent suspended him for dishonesty and deliberate, severe violation of Airgas and Department of Transportation (DOT) policy when on June 22, he completed DOT paperwork off the clock. Froslear testified that he would have terminated Rottinghouse for this offense, but instead followed his legal counsel's advice not to do so. On September 22, 2015, the Regional Director dismissed this charge due to insufficient evidence to establish a violation of the Act. (Jt. Exh. 6.) On November 5, the Board denied Rottinghouse's appeal of that dismissal. (Id.)

Rottinghouse and Froslear also attended a grievance meeting on August 5 concerning his prior 3-day suspension.⁷ (Tr. 61-62; 147-148.)

B. August 3, 2015 Incident, Its Aftermath and Discipline

1. August 3 incident

On the morning of August 3, Rottinghouse left the Cin-Day plant in his truck along with a coworker, Robert Oestreicher.⁸ They went to a General Electric (GE) facility, and while there, made several stops to pick up empty cylinders. One of those stops at GE was a "training stop," where Oestreicher showed him how to lift a 12-pack cradle of cylinders with a crane.⁹ Rottinghouse also carried at least one other load of cylinders, attached to a metal pallet with two straps, on his truck. When they left GE, they returned to Respondent's facility.

Upon reaching the Cyn-Day plant, Rottinghouse stopped his truck, got out and opened the entrance gate. After returning to his truck and driving forward a bit, the gate blew back towards his truck, causing him to abruptly hit the brakes in order to

avoid hitting the gate.¹⁰ At that point, without having to get out, he pushed the gate back away from his truck, and proceeded through the entrance and parked his truck in Cyn-Day plant's yard close to the building. Both he and Oestreicher left the truck and entered the plant/building.

Rottinghouse claimed that once inside, he saw and made eye contact with Froslear, who was about 20 feet away from where he (Rottinghouse) stood in the break room near the mailboxes. They did not speak. After using the restroom, he proceeded back out to his truck, and saw Froslear taking a picture with his phone. He testified that he walked around the driver's side to the back of the truck to see what Froslear was looking at. He stated that as he approached the back of the truck from driver's side, he and Froslear, who was about 10-15 feet away on the rear passenger side, made eye contact with each other. He further testified that as he continued on to the rear passenger side to the truck's lift controls, Froslear walked back into the building without saying a word. It is undisputed that next, Rottinghouse climbed onto the back of his truck, and straightened and re-strapped four leaning cylinders. After doing so, he got into his truck, left the Cyn-Day plant and completed his route. (Tr. 139-144, 146.)

According to Froslear, he was standing by his car in the parking lot near the plant entrance when he witnessed Rottinghouse pull into the driveway, stop to open the gate and continue on to park in the yard.¹¹ He testified that at the same time, he also "heard . . . rattling" and "witnessed cylinders falling" on the back of Rottinghouse's truck when it "came to a stop." When asked if he actually saw them fall, Froslear admitted that they did not fall down, but "tilted" over 10-15 degrees. (Tr. 28-29.) He testified that "[w]hen [Rottinghouse] entered the yard until he came to a stop, they [the cylinders] were standing straight up. When he came to a stop, they tilted." When asked exactly when he saw the cylinders move, he responded that "I saw them tilt when he came to a stop in the yard," and not at the gate. (Tr. 31-32, 34.) Next, Froslear went back inside the building, retrieved his cell phone and safety glasses and proceeded out to photograph the cylinders on the back of Rottinghouse's truck. Froslear never physically examined or even touched the cylinders, but testified that he did not need to do so because he had seen them move. Afterwards, he went back inside the plant where he observed Rottinghouse (from a window) fix the leaning cylinders. (Tr. 28-30, 37-38, 65.)

Froslear denied seeing Rottinghouse at any time after he [Rottinghouse] parked his truck in the yard. He testified that he was too busy concentrating on getting his camera and safety glasses; he also claimed not to have known where Rottinghouse was. He admitted, however, that he saw no need to try to find

⁶ On August 20, the Regional Director approved withdrawal of the 8(a)(3) and (4) charge allegations. The settlement included a notice posting that Respondent would not "threaten to change" its discipline policy due to prior charges or participation in the Board process; it did not contain a nonadmissions clause. (Jt. Exh. 5(d).)

⁷ Froslear recalled that such a meeting took place, but not the date on which it occurred. Since he could not rebut that it did occur on August 5, I credit Rottinghouse's testimony that it did. (Tr. 61-62; 147-148.)

⁸ When asked on cross-examination, Oestreicher admitted that he was not only Rottinghouse's co-worker, but also his stepfather. (Tr. 177.)

⁹ Froslear testified that he did not know about Oestreicher riding with Rottinghouse on August 3, but no one disputed that Oestreicher did so. (Tr. 38-39, 134-137, 168.)

¹⁰ I credit Rottinghouse's testimony that he made an abrupt, "hard" stop at the entrance gate. Oestreicher supported it, stating that Rottinghouse "stepped on his brakes real hard," and had to reopen the entrance gate. (Tr. 167-169.) Froslear denied seeing Rottinghouse make an abrupt or hard stop at the gate, but did not dispute that it might have occurred. (Tr. 30-35; Jt. Exh. 9.)

¹¹ Both Oestreicher and Rottinghouse testified that they observed Froslear standing by his car when they pulled into the plant. (Tr. 137-138, 170.)

or talk to him at any time on August 3 since he witnessed the cylinders tilt and Rottinghouse sufficiently secure them. (Tr. 38–39, 42). In fact, he swore that he would not have allowed a driver to return to the road with a “serious safety issue” without first ensuring that it had been corrected. (Tr. 37.) For reasons discussed below, I discredit Froslear’s testimony that he did not see or know where Rottinghouse was, and that he actually witnessed the cylinders tilt over.

There is no dispute that the photograph that Froslear took accurately depicts the condition of the leaning cylinders in question after Froslear parked his truck in the Cyn-Day plant’s yard. It reflects four cylinders leaning slightly to the left—three tall cylinders in the back row with one shorter, smaller leaning against the front of two of the taller ones. It also shows two straps, fastened with ratchets, around the cylinders. The lower strap, however, drapes down the front of the shorter, smaller cylinder in front. (See Jt. Exh. 2.)

2. Froslear’s actions on August 4

On August 4, Froslear sent an email to Respondent’s driver trainer, MacBride, with an attached photograph of the leaning cylinders on the back of Rottinghouse’s truck. He asked MacBride “What do you think about this? Look good to you?” MacBride responded, “[n]o with the cylinders being offset we would be hit for insecure load just by how it looks. Where is this truck.” Froslear replied, “CinDay.” MacBride stated, “[n]ot good, did the driver catch it before leaving,” to which Froslear replied “I saw it when he pulled into the yard.” MacBride then asked “Did it get fixed before leaving,” and MacBride responded, “[t]his is the way it was when he pulled in after his run.” MacBride emailed back “Unacceptable” Froslear then asked “[w]here would I find the strongest language about load securement that drivers are trained to?” MacBride told him that he could find such “[i]n the driver training manual.” Finally, Froslear told MacBride to call him when he had time, and “to zoom in on how the cylinders were strapped down.” During this email exchange, Froslear did not tell MacBride that Rottinghouse had been driving the truck in question, nor did he tell him that Rottinghouse fixed his load before returning to the road. (Tr. 116–117; Jt. Exh. 3.)

3. Rottinghouse’s discipline and grievance meetings¹² August 6 discipline meeting

On August 6, Froslear and Luehrmann met with Rottinghouse and issued him a written warning letter (dated August 5) for failing to secure cylinders.¹³ Barry Perkins (Perkins), union representative, attended the meeting on Rottinghouse’s behalf. The warning letter stated:

On Monday afternoon, 8/3/15, Clyde Froslear was in the parking lot when he heard rattling and saw you pulling into

the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.

You have been trained on the proper way to secure cylinders while being transported. According to the Driver Training Manual, ‘cylinders must be strapped, chained or secured to the vehicle so that they *do not move or rattle*.’

Recommended correction action:

As an Airgas Driver, you are expected to take personal responsibility for creating and maintaining a safe environment and to perform your job with the understanding that working safely is a condition of your employment with Airgas. For this reason you are expected to properly secure cylinders when transporting them, as well as follow all other DOT procedures while performing any other duties related to your job.

Consequences of not following recommended action:

As you know, Airgas Great Lakes maintains strict policies to ensure safety in the workplace and to ensure the safety of our associates, customers, and the general public. It is your responsibility to follow Airgas’ standard safety policies and procedures as well as other policies of the Company and to role model the behaviors that support our policies. You are an experienced employee and we value your contributions to the company and expect immediate and consistent improvement in following these policies and practices. Further incidents will result in additional disciplinary action up to and including discharge.

Rottinghouse refused to sign the warning letter. Luehrmann signed it; Perkins signed as a witness; and Froslear initialed it. (Jt. Exh. 1.; 4, p. 19.)

During that meeting, however, Froslear explained that when he saw Rottinghouse pulling into the yard, he “heard loose cylinders rattling and when [Rottinghouse] came to a stop saw them move, fall forward.” Rottinghouse told Froslear that he saw him taking pictures, and asked why he (Froslear) did not come to get him. Froslear responded that he “took the pictures so [he] could send them to our driver trainer Mark MacBride for his opinion.” Rottinghouse said that the “rattling noise was coming from a HY bank.”¹⁴ Froslear asked why he decided to return to the trailer and fix the leaning pallet of cylinders if the noise was coming from a HY tank. Rottinghouse responded, “[b]ecause I saw you taking pictures.” Then, Froslear asked how Rottinghouse knew that he “was not taking pictures of the tailgate or the trailer.” Next, Rottinghouse asked to see the pictures. Froslear answered that he would “be glad to, but not right now.” He further stated that “[t]he picture will show the same thing you saw and the reason you got back up on the trailer to fix. If you are arguing that the pallet was not the cause of the rattling noise, why did you get back up on the trailer, rearrange the straps and tighten the load down?” Then, Rottinghouse refused to sign the letter, and the meeting ended. (Jt.

¹² Froslear took notes of each of these meetings, which were submitted by the parties as joint exhibits (Jt. Exhs. 7, 9–10.) I credit these notes as being an accurate version of what was said during the meetings. Neither Rottinghouse nor his union representative, Barry Perkins, disputed the accuracy or contents of Froslear’s notes.

¹³ The parties stipulated that the warning letter, dated August 5, was issued on August 6.

¹⁴ HY bank refers to a 12-pack cradle of hydrogen cylinders. No one disputed Rottinghouse’s testimony that these cylinders were empty when he returned to the Cyn-Day plant on August 3.

Exh. 7.)

Several minutes later, Perkins returned to Froslear's office, presented him with Rottinghouse's grievance #29582 filed with Local 100, and asked to see the pictures that he had taken. Froslear showed him the pictures. According to Froslear's notes, both he and Perkins "agreed the pictures show the cylinder[s] were loose and could understand why Steve fixed them before leaving." (Id.)

The grievance/claim stated in relevant part the following:

[O]n 8-6-15 Received write up for 'loose cylinders' on truck 8-3-15. Written warning issued. Only Should Be Verbal. Cylinders are leaning a little bit But not Rattle. Rattling cylinders were from Hy C23 with loose cyls. Requested pictures for union. Refuse to show pictures ... Leaning cyls were fixed Before leaving yard written warning is excessive, Should Be Removed

(Jt. Exh. 8.)

September 2 grievance meeting

Rottinghouse and Perkins met with Luehrmann and Froslear again on September 2. Rottinghouse explained why he should not have received a warning letter. He stated that "[w]hile pulling into the yard the gate started to close. I hit my brakes which cause the cylinder to lean forward. I got up on the trailer and fixed the load before leaving. This all happened in the yard and I should not have received a warning letter." Froslear responded:

Not true. You had just come off the road and the cylinders were not strapped securely. So it didn't happen in the yard. If they were strapped securely hitting the brakes would not cause cylinders to lean. I have seen trailers turned over and cylinders still strapped in place. So I don't think hitting brakes would do this, do you?

(Id.) Rottinghouse replied that "[i]t's possible."

When asked by Froslear what part of article 22 of the CBA Respondent violated, Perkins responded that the "warning letter should have been a verbal according to the contract." Froslear pointed out that article 22, paragraph A states that a "Written warning notice stating violation will be given to employee." Rottinghouse repeated that the written warning "is too severe; it should have been a verbal." When Froslear refused to change the discipline to a verbal warning, the meeting ended. (Jt. Exh. 9.)

September 23 grievance meeting

The parties met once more on September 23, with Ron Butts, another union representative, and Barry Perkins representing Rottinghouse, and Luehrmann and Froslear for Respondent. Butts read the grievance and said that they were there "to reduce this to a verbal." Froslear asked Butts to read article 22, paragraph A. At that point, Rottinghouse interrupted, stating that "the rattling was not the cylinders in question but cylinder in a hydrogen bank." Froslear's notes reflected his response:

Explained to RB [Ron Butts] since he is not familiar with a cylinder bank, that there might have been additional rattling coming from the hydrogen bank but the cylinder[s] are se-

cured inside a steel cage. They are very secure and would not come out and possibly fall on to the highway. The cylinders we are talking about today were loose and could fall off the trailer.

(Jt. Exh. 10.)

Finally, in response to Froslear's question about which part of the contract he had violated, Butts said that "[Rottinghouse] thinks the warning should be reduced to a verbal since this was his first offense." Froslear pointed out that this was not the first offense. Butts then asked if the warning letter would stay in Rottinghouse's file for 12 months, Froslear said that it would. Butts asked again if Froslear would reduce the written warning to a verbal one, and Froslear still refused to do so, stating "[n]o because it is not Steve's first DOT violation and because of the severity of this event." (Id.)

Butts then stepped out to talk to Perkins and Rottinghouse. Afterwards, Butts told Froslear that he considered the matter "deadlocked," and would be sending a letter documenting the Union's intentions to arbitrate and present the matter to the "Unions Board." (Id.)

C. Respondent's Discipline Policies and Discipline Issued

1. CBA

The collective-bargaining agreement (CBA) between Respondent and the Union Local 100,¹⁵ article 22 (rights of management section), set forth the manner in which Respondent should take disciplinary action against employees who violated rules and regulations. Its relevant parts state:

Disciplinary action taken by the Employer for violation of either Company rules and regulations or employees' violations of articles contained herein, will be handled in the following manner:

A. Written warning notice stating violation will be given to employee, with a copy to Union and Union Steward and a copy becomes part of the employee's personnel file;

B. This written notice to be given within five (5) working days of said violation;

...

E. The warning letter shall remain active in an employee[s] file for a period of twelve (12) months from the date of such letter. After twelve (12) months, a warning letter will not be used for progressive discipline.

F. Suspensions shall remain active in an employee file for a period of eighteen (18) months. After eighteen (18) months a suspension will not be used for progressive discipline.

(Jt. Exh. 4, p. 16.) Therefore, according to the CBA, all disci-

¹⁵ The collective-bargaining agreement (CBA) between Respondent and the Truck Drivers, Chauffeurs and Helpers, Public Employees, Construction Division, Airlines- Greater Cincinnati/Northern Kentucky Airport and Miscellaneous Jurisdiction, Greater Cincinnati, Ohio Local Union 100, an affiliate of the International Brotherhood of Teamsters (the Union/Local 100) was effective from December 1, 2012 through November 30, 2015.

pline began with a written warning letter; there was no mention of or provision for any type of verbal warning. (Jt. Exh. 4, p. 16.)

2. Airgas procedure/policy

There is little dispute that the Cin-Day facility management discipline policy departed from the CBA's article 22. However, there was some disagreement, inconsistency, and apparent confusion on Froslear's part, as to when and how it did so. When asked at hearing how Respondent's employee "progressive discipline policy" works, Froslear stated that "[f]or minor offenses, in the past we would verbally approach the employee and tell him what was going wrong. Per the contract, it starts at written and then it's suspension."

As previously stated, Froslear addressed Respondent's disciplinary policy during two safety meetings with employees in April (28th). When asked if he told employees in those meetings that they would receive verbal warnings for minor offenses, he responded that "during the meeting, what I told them was that, moving forward, we were going to no longer—a verbal pat on the back, hey, you forgot your safety glasses, that we were going to have to document it." (Id.) However, in connection with Case 09-CA-152301, he gave sworn Board affidavit testimony that:

At the meeting I wanted to make clear to the employees that once they violated a rule for the second time, they would receive a written warning...In the collective bargaining agreement for this facility...the disciplinary process says that an employee will... get a written warning after the first violation of rule... However, for example, if we see an employee not wearing safety glasses we will first tell that employee to make sure they are wearing their safety glasses. However, if we see the same infraction again we will give that employee a written warning.

(Tr. 25-26; GC Exh. 2.) After reading his affidavit testimony, Froslear backtracked, and added that in those meetings, he told the team that "... moving forward we were going to document that conversation as a progressive discipline. I want to document everything moving forward." (Tr. 27.) When asked why he stated in his affidavit that "[a]t the meeting I wanted to make clear to employees that once they violated a rule for a second time they would receive a written warning," he said that "the first one's going to be a verbal documented. The second one would be a written document. All will be documented." (Id.) He also claimed that he issued warning letters to employees who repeated minor offenses and to employees who committed major or serious first time violations. This is a clear departure from his affidavit, in which he testified that he "never said that the disciplinary process was changing" going forward, and during which he never made any distinction between major and minor offenses. (GC Exh. 2.)

In Luehrmann's Board affidavit in Case 09-CA-52301, he stated that Froslear used the hypothetical about safety glasses "to illustrate his point about the disciplinary procedure," and tell employees that "if a manager saw an employee without safety glasses, the manager would verbally remind the employee to make sure he was wearing his safety glasses. If the man-

ager then saw the same employee committing the same infraction, the manager would give that employee a written warning." Luehrmann testified that it "is the same disciplinary process that has always been in place, Froslear simply wanted to make sure all employees understood it;" he emphasized that "Froslear did not change the disciplinary process or procedure" in those meetings or threaten to do so. (GC Exh. 3; Tr. 102-103). Unlike Froslear, Luehrmann's hearing testimony regarding this matter was consistent with his (Luehrmann's) prior affidavit testimony. Therefore, for purposes of this case, I credit Luehrmann's more consistent, testimony regarding statements made by Froslear at those April employee safety meetings.

3. Discipline issued by Respondent

The General Counsel introduced evidence of disciplinary statements issued to Respondent's employees from 2011 through 2016, with various titles: verbal counseling, verbal warning, written counseling, written warning, warning letter and suspension.¹⁶ All of these statements, including verbal counselings and warnings, were documented in writing. It was undisputed that Froslear made no distinction between a "written counseling," "written warning" or "warning letter," and considered them to be "equal." (Tr. 82.)

A review of the history above shows that, more often than not, Respondent handed out discipline a couple of days or more after the incident in question. Therefore, it was not unusual that Rottinghouse received his warning letter 3 days after the cylinder incident. In addition, it reflects that Respondent's practice, irrespective of the CBA, article 22 provision, was to issue documented and undocumented verbal counseling and warnings for certain first time offenses. Respondent issued these types of verbal discipline through September 21, 2015. (GC Exh. 4, pp. 6, 8-10, 13-16, 20.)

The only discipline of record for carrying an unsecured load was a "written counseling" issued to employee Huff on March 10, 2011 for transporting unsecured cargo (on March 8) in the form of a loose cylinder on the floor of the trailer, a pallet of liquid containers secured with only one strap and another unsecured pallet. This was documented as a DOT violation, and he was required to review DOT/Safecor driver requirements for securing cylinders and to ride with the driver trainer. I note that Rottinghouse received a written warning, but was not required to take any remedial action other than to follow the rules. (GC Exh. 4, pp. 1, 19; Jt. Exh. 1.)

Most verbal discipline was documented as a "verbal counseling" or "verbal warning." In 2013, they were issued to: employee Hollander for leaving grease on the steering wheel of a forklift; employee Carlo for not wearing proper leather gloves when filling high pressure cylinders; and employee Jeffries for a preventable backing accident. In 2014, they issued to employee Perkins for not wearing a seatbelt while using a forklift. In 2015, to employees Huff and Kinkade for DOT violations of clocking in 1-3 minutes early¹⁷, and to employee Oestreicher

¹⁶ See GC Exh. 4, pp. 1-21; GC Exh. 7. Respondent provided these documents in response to the General Counsel's subpoena duces tecum.

¹⁷ DOT regulations require that commercial truck drivers be off duty for 10 consecutive hours prior to clocking in for their next shift.

for talking on the cell phone while operating a tow mower. (GC Exh. 4, pp. 6, 8–9, 13–15, 20; GC Exh. 7.) Another, dated in 2013, and reduced to a verbal counseling from an unrecorded greater discipline, issued to employee Reed for DOT violation of driving while on the phone. This verbal counseling noted that Reed's conduct could have subjected him to a \$2570 fine and Airgas to an \$11,000 fine. (GC Exh. 4, p. 10). Froslear could not recall whether or not this discipline was reduced through a grievance, but there is no doubt that it was reduced. In addition, an untitled note, not written on the standard Airgas form, reflected a discussion with an employee "Steve" in 2013 for a load verification mistake.¹⁸ (GC Exh. 4, p. 9.) There is also evidence of two unwritten verbal discussions—one with employee Baker on November 14, 2011 for a first offense of not wearing safety glasses, and another with employee Haynes in November 2013 for his first offense of improperly performing the pre-fill inspection process (costing the operation \$2500). (GC Exh. 4, pp. 3, 11).

"Written counseling" statements and "written warnings" were issued as follows: in 2011, to employee Bowman for a backing accident and employee Baker for a repeated incident of not wearing safety glasses; in 2012, a second to Baker for failing to complete and correct his trip load verification and hazardous material manifest—actions that "cause incorrect cylinder balances at our customer, incorrect stock level internally and violates DOT requirements;" in 2013, to employee Hollander for not wearing a seat belt while operating a forklift, noting that this followed a verbal warning for his first offense of leaving grease on a steering wheel (see above); in 2014, to employee Haynes for failing to fill cylinders and perform the proper prefill inspection process "resulting in episodes uncovered recently," and which cost Airgas \$4500; in 2016, to employee Huff for a preventable backing accident (ran into the side of another company's building). (GC Exh. 4, pp. 2–4, 7, 11–12, 21). The written warnings to employees Baker and Hollander were the only instances of record where Respondent issued written warnings after first giving some type of verbal discipline for a violation of the same or another rule. (See above; GC Exh. 4, pp. 3, 6–7.)

Of note, Baker received his second written warning within about 6 months of his first, which did not mention the first one. And, within about 5 months of the second warning, he received a 3-day suspension for being caught on the road, during a DOT inspection, without a valid medical certificate. The suspension stated that "[t]his is not the first issue you have had following DOT compliance as an Airgas driver." (GC Exh. 4, pp. 3–5). The only other suspension was the 3-day suspension given to Rottinghouse on June 26, 2015. (GC Exh. 4, pp. 17–18.)

Froslear testified that Respondent considered more serious or "major" Airgas or DOT violations to include incidents such as backing or motor vehicle accidents, driving with unsecured loads, "going down the road with incorrect paperwork" (failing

to provide complete and correct trip load verification and hazardous material manifest), and driving a vehicle without a valid medical certification.¹⁹ (Tr. 69–94.) He did not, however, consider a first offense to be major when it resulted in Respondent having to spend thousands of dollars in costs. (Tr. 94). I reiterate that he did not share these distinctions with employees during the April employee safety meetings or in his previously discussed Board affidavit.

There appears to have been at least two exceptions to Froslear's serious incident rule, wherein employees receive warnings rather than verbal discipline for first time major/serious violations. Regarding the first, employee Jeffries only received verbal discipline for his preventable vehicle backing accident on May 10, 2013. (GC Exh. 7.) This particular verbal warning, issued and signed by Luehrmann, was not written on a standard Airgas discipline form. Luehrmann did not recall whether or not he had received Froslear's approval prior to issuing the discipline, but did recall providing it to him in connection with the General Counsel's subpoena. Froslear testified that he never knew about this incident prior to the hearing. However, I discredit testimony that he was not familiar with this verbal warning. Other evidence shows that he approved discipline at the Cyn-Day plant. Nevertheless, both he and Luehrmann considered a backing accident to be a serious offense. Next, I find it incredulous, that in employee Reed's case, Froslear did not consider a commercial truck driver talking on the phone while driving on the road a serious DOT infraction. He obviously believed it to have been at the time, since it was reduced from some form of greater punishment. Moreover, DOT apparently considered it to be a serious or major violation since it levied substantial fines for such offenses on both drivers (\$2570) and their employers (\$11,000) (for Company). (GC Exh. 4, p. 10.)

According to Froslear, other examples of minor Airgas or DOT violations included failing to wear gloves, leaving grease on equipment, not wearing safety glasses, and clocking in a few minutes too early. (Tr. 69–94.)

III. ANALYSIS

A. Preliminary Determinations

1. Evidentiary finding

Rottinghouse testified that during the August 6 meeting, he asked Froslear to go check the 12-pack cradle that had been on his truck to see if it rattled, but that Froslear refused to do so. He claimed that the same cradle had been removed from his truck, at an unspecified time by an unspecified person, between August 3 and 6, and stored at the Cyn-Day plant until August 6. He further testified that after the August 6 meeting, he (Rottinghouse) he took a video recording, with audio, of him shaking the same 12-pack. The General Counsel played this video at the hearing; and, it indeed showed Rottinghouse moving a 12-pack cylinder bank back and forth, causing it to make noise. The General Counsel offered this video to support Rotting-

¹⁸ There was no evidence presented that this "Steve" was the Charging Party. Luehrmann testified that he signed this note, but was not involved in the matter. However, the signature or initials on it appear to be Froslear's when compared to Froslear's initials at the bottom of Rottinghouse's warning letter (Tr. 108; GC Exhs., pp. 4, 19.)

¹⁹ Froslear also considered completing DOT paperwork off the clock to be a severe violation. (See Rottinghouse's suspension at Jt. Exh. 1 & GC Exh. 4, pp. 17–18.)

house's claim that the noise that Froslear heard on August 12 came from the 12-pack of hydro cylinders, over which Rottinghouse had no control, versus the tilting cylinders. I admitted this recording into the record; however, I give it little if any evidentiary weight. The General Counsel failed to show that it was the same 12-pack cradle, or that if it was, that it had remained in the same condition (i.e., no chain of custody evidence presented). Next, there is no evidence that Rottinghouse's shaking demonstration constituted an accurate simulation of motion and rattling that might have resulted from a sudden stop at the plant's gate. (Tr. 152–161; Jt. Exhs. 1, 7, 9–10.)

2. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, *supra* at 622. Indeed, in this case, I have believed witnesses on some points, but not on others. If there is any evidence not recited herein that might seem to impact the credited facts set forth, I have not ignored such evidence, but considered it and determined it is not essential in deciding the issues, or I have rejected or discredited it as not reliable or trustworthy.

Although I credited Rottinghouse's testimony that he made a sudden stop to avoid hitting the gate, I doubt his testimony that the sudden stop caused the cylinders on his truck to tilt over. During the August 6 disciplinary meeting, he never mentioned that he believed that the cylinders on his truck tilted as a result of his sudden braking at the gate. He did not offer this explanation until the September 2 grievance meeting. (Jt. Exhs. 7, 9.) (Jt. Exhs. 7, 9.) I find that if he really believed that his sudden braking caused them to move, he would have told Froslear so at the August 6 meeting. Therefore, I do not credit Rottinghouse's testimony that he knew when or how the cylinders on his truck must have moved. Rather, I find that he speculated about what happened after he received the warning letter.

Next, I find that contrary to testimony by Perkins and Oestreicher (see below), the cylinders were not properly secured. As stated, even Rottinghouse believed that they were not, and accordingly, fixed them before resuming his route. He even acknowledged that he should have been issued a verbal warning rather than none at all.

There is no dispute that the cylinders on Rottinghouse's truck at some point tilted while they were being transported back to the Cyn-Day plant, and that Rottinghouse was responsible for loading and securing them. The dispute is whether or not he properly secured before them leaving the GE site. He believed that he did, and Froslear attributed the tilting cylinders to his failure to do so. Although he did not see Rottinghouse slam on brakes at the gate, Froslear testified that if such a stop

occurred, it would and should not have caused the cylinders to lean over had they been properly fastened in the first place. (Jt. Exh. 9.)

Testimony of Oestreicher and Perkins

Thus, there was a lot of back and forth among the parties' witnesses about whether or not abrupt braking at the gate or normal driving conditions would or could have caused properly secured cylinders to become loose and lean over.²⁰ The General Counsel's witness, Oestreicher, testified that based on his 21 years of driver experience, it is quite possible and "in the normal routine" for straps on cylinders to work their way down during transport. However, he also stated that the cylinders as depicted at Joint Exhibit 2 were in fact still secure because "[t]hey're not falling over. They're not criss-crossed. They're not anything but standing upright and secure." He also testified that had he driven into the Cyn-Day plant parking lot with similarly leaning cylinders, he probably would not have retied them: "I mean, if it looks out of place, you would re-secure it. But if the bottle is typically leaning a little bit, nothing." (Tr. 174.) I discredit Oestreicher's testimony. His testimony is not reliable as the cylinders on Rottinghouse's truck were clearly not standing upright or properly tied.

Perkins, also an Airgas driver at the Cyn-Day plant, testified cylinders such as those on Rottinghouse's truck frequently come loose under the following circumstances:

... if you don't have those straps exactly right on those cylinders the vibration, going down the road, or any kind of shift, it holds—anything will drop those straps. Now, the straps are still around and the cylinders are still secure. But there might be sway in the cylinders ... The cylinders look secure. The straps go around. All I can tell you is that these pallets are not designed to hold three or four cylinders. They are designed to hold 14 cylinders, or 10 or eight. But when you start getting three or four cylinders, and it's hard to secure these cylinders.

(Tr. 186–188.) In his opinion, it was "[v]ery common" to have to readjust the straps throughout the day due to normal driving conditions. Like Oestreicher, he did not believe that the cylinders in the photograph appeared to have been in danger of coming completely loose or falling down. Unlike Oestreicher, he admitted that if he had similarly tilted bottles on his truck, he would have straightened and re-strapped them. (Id.) I find that Perkins' testimony was somewhat equivocal in that he admitted that "if you don't have those straps exactly right on those cylinders the vibration, going down the road, or any kind of shift ... anything will drop those straps." In addition, it is clear from Respondent's rules and regulations, that cylinders were to be securely fastened no matter how many or how small they were.

Testimony of Froslear and MacBride

On the other hand, Froslear and MacBride testified that in the normal course of driving an Airgas truck, it was almost impossible for properly strapped cylinders to shift or tilt. Both testified that the cylinders on Rottinghouse's truck were not

²⁰ There is no dispute, as stated above, that local drivers were required to check and make any readjustments necessary to their loads at each stop.

properly secured or nested, and at risk of falling. (Tr. 43–47, 195–200, 208–210.) Froslear went to great lengths describing the appropriate nesting technique and how Rottinghouse had not utilized it. (Tr. 43–47.) Froslear also testified that if the cylinders on Rottinghouse’s truck were “tilted over in the first place, they are loose,” and that going down the highway, it was possible for them to break free of the straps. He explained that the “small cylinder could have easily fell out. Notice at the top, that strap is just at the cap level. That cylinder, that’s nothing stopping it at the bottom from slipping down and coming out.” (Tr. 36–37.) With some degree of hesitation, he finally admitted that it was not common, but possible for properly secured cylinders to come loose. (Tr. 43–45.)

MacBride testified that “[e]xcessive slamming on brakes could cause moving of cylinders.” Initially, he defined excessive braking as “[g]oing 40,50 miles an hour and slamming on the brakes to the point you’re almost skidding . . .” He insisted that even then, “[p]roperly strapped cylinders should not move on your truck” under those circumstances. When asked if coming to a sudden stop after accelerating through an open gate from a stopped position would cause properly strapped cylinders to shift, he answered “absolutely not.” When asked if improperly strapped cylinders would shift, he said “yes.” (Tr. 195–200, 208–209.) He further stated that it would be considered a serious out-of-service DOT violation if caught on the road, of which management and the driver would be fined. In his opinion, “moving cylinders are moving cylinders,” no matter whether they are tilted over or freely falling and/or moving inside of a pallet on a truck. The DOT employee would write it up the same way. (Tr. 212.) However, he admitted that it is appropriate to physically inspect cylinders. Moreover, he testified that if he saw a driver with leaning cylinders, he would go find the driver and tell him to fix it. (Tr. 213–214.)

I discredit testimony of Rottinghouse, Perkins, and Oestreich that properly secured cylinders routinely become loose under normal driving conditions. If this was the case, there would likely have been some evidence of drivers receiving DOT citations or more drivers receiving some type of discipline. Further, I certainly do not believe that Airgas and DOT requirements for drivers to check their loads at each stop only exist because it is common place for appropriately secured loads to become loose. Nor do I find it impossible for properly secured cylinders to become loose under certain conditions. However, I credit MacBride’s testimony that stopping suddenly at the gate under the circumstances set forth by Rottinghouse would not have caused properly secured cylinders to tilt. Rottinghouse entered the gate, stopped to open it and began to move through the gate before having to hit his brakes. Although there was no evidence as to Rottinghouse’s speed after he reopened the gate and entered the plant yard, I find it implausible that it would have been fast enough such that hard braking would have caused appropriately tied cylinders to loosen and lean over. Therefore, I find it more likely than not, that the cylinders on Rottinghouse’s truck were not properly fastened when he left the GE stop.

On the other hand, I discredit Froslear’s testimony that he actually saw the cylinders fall or even tilt when Rottinghouse stopped in the yard. His testimony on this point was equivocal,

hesitant and largely inconsistent with other statements. He initially testified that he saw the cylinders falling when Rottinghouse pulled into the yard, but on further questioning, admitted that they did not fall, but rather tilted. Further, he failed to mention in his emails to MacBride on August 5 that he saw the cylinders on Rottinghouse’s truck move. Instead, he wrote that “[t]his is the way it was when he pulled in after his run.” (Jt. Exh. 3.) Moreover, the warning letter stated that Froslear “was in the parking lot when he heard rattling and saw you pulling into the yard. When he went to investigate the noise, he saw that you had a pallet on your truck that was not properly strapped, which was causing the noise.” When he gave Rottinghouse the warning letter on August 6, he said that he “witnessed SR pulling into the yard, I heard loose cylinders rattling and when SR came to a stop saw them move, fall forward.” (Jt. Exhs. 1, 7.) It is my opinion that more likely than not, as set forth in the warning letter, Froslear did not see that the cylinders were loose and tilted until after Rottinghouse parked in the yard. Thus, I find that he fabricated this part of his story in order to bolster his reasons for issuing the warning letter.

Further, I have discredited Froslear’s testimony that he did not see Rottinghouse when they were both near Rottinghouse’s truck. Froslear claimed that he did not know where Rottinghouse was, but he certainly knew that he was somewhere on the premises. In addition, he knew to watch through a window to see what Rottinghouse would do next after he (Froslear) finished taking the pictures. I do not believe that it was mere coincidence that he happened to be looking out the window when Rottinghouse was re-securing his cylinders. Moreover, I find that Froslear’s actions were incongruent with those of a manager concerned about safety or even about his drivers or Company receiving DOT citations and fines for driving with unsecured loads.

Neither Froslear nor Rottinghouse were entirely honest regarding their versions of events on August 3. However, I find that overall, Froslear was far less credible. I find that Froslear’s inconsistent and unbelievable testimony about discipline, misrepresentation about falling cylinders, dishonesty about not seeing Rottinghouse outside near the truck, failure to physically examine the cylinders on the truck and failure to find Rottinghouse and correct the unsecured cylinders support my finding below that he was not credible regarding his real reasons for issuing Rottinghouse’s warning letter and not agreeing to reduce it to a verbal counseling or warning.

B. Legal Standards

Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

In cases in which motive is an issue, the Board analyzes 8(a)(4) and (1) violations under the *Wright Line* framework.²¹

²¹ *Wright Line*, 251 NLRB 1083, 1089 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). See also, *Newcor Bay City Division*, 351 NLRB 1034 fn. 4 (2007); *Verizon*, 350 NLRB 542, 546–

The burden is on the General Counsel to initially establish that Respondent's decision to take an adverse action against an employee was motivated, at least in part, by protected Board participation. In order to meet this burden, the General Counsel must show that the employee engaged in activities protected by the Act; the employer was aware of the activity; and the activity was a motivating factor in the employer's adverse decision. Once the General Counsel has met its initial showing sufficient to support an inference that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to that it would have taken the same action even in the absence of the protected conduct. (Id.)

The Board will consider circumstantial as well as direct evidence to infer discriminatory motive or animus, such as: (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (3) disparate treatment in implementation of discipline; (4) inappropriate or excessive penalty; and (4) employer's shifting or inconsistent reasons for discipline. *CNN American, Inc.*, 361 NLRB No. 47 (2014) (citing *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011)).

C. The Initial Burden Was Met

Here, it is undisputed that Rottinghouse engaged in Board activity protected by Section 8(a)(4) of the Act when he filed prior charges with the Board on May 14 and on July 7. There is also no genuine controversy that the Board processed and investigated these charges until they were resolved in September (see above). Although Respondent indicates in its Brief that it was not aware of Rottinghouse providing affidavits in these cases, it is clear from the evidence that the Board conducted investigations in each of them. In the first, both Froslear and Luehrmann provided affidavits, and I seriously doubt that the Board would have decided not to elicit testimony from the Charging Party. As for the latter, it is clear that the Board conducted a thorough investigation, and there is no evidence that the Charging Party and Respondent's management officials did not participate in that investigation. (GC Exhs. 2-3; Jt. Exhs. 6-7.) Therefore, I find that Respondent not only knew that Rottinghouse filed charges under the Act, but also should have known that he participated in Board investigations of those charges. I have also credited testimony that Froslear participated in an August 5 grievance meeting regarding the suspension made the basis of Rottinghouse's July 7 charge.

The only element left for me to determine is whether or not the General Counsel has established a prima facie case of animus. First, I find that the timing of the warning in this case is suspicious, in that it closely followed Rottinghouse's second charge in Case 09-CA-155497 by only 1 month. I dismiss Respondent's argument that timing here is not determinative because Rottinghouse's filed his first charge in Case 09-CA-152301 almost three months prior to issuance of his warning

letter. (R. Br. at 10-11.) The investigation in that case was ongoing as evidenced by the affidavits of Froslear and Luehrmann, signed and sworn before the Board agent on July 13, and as previously discussed, did not close until September. Further, Respondent's reliance on *M&G Convoy*, 287 NLRB 1140, 1144-1145 (1991), on this point is misplaced. In that case, the Board affirmed the judge's determination that there was no "credible evidence" that Respondent took any adverse action based on the charging party's protected activity. That decision was based on factual findings that although the deciding official generally knew about the charging party's protected activity, he was not involved or implicated in any of the incidents "which could fairly give rise to an inference of animus." Here, Froslear was involved, and the implicated official in both of Rottinghouse's charges, as well as the deciding official in connection with his suspension. Further, although the Region dismissed Rottinghouse's most recent charge regarding his 3-day suspension, this did not occur until almost two months after issuance of his letter of warning. Finally, in *M&G Convoy*, supra, the judge placed emphasis on the fact that timing was the primary basis for showing motive. Such was not the case here.

In addition to timing, I find that Froslear's actions on August 3 demonstrate a complete lack of concern for safety, which is in direct contrast to his testimony about the main reason that he issued Rottinghouse a warning letter. Most striking is his failure to locate Rottinghouse and address the conditions of the cylinders on Rottinghouse's truck immediately after he discovered that they were not securely fastened. Froslear's failure to attempt to promptly correct what he described in testimony as an extremely dangerous situation, along with his overall dishonesty discussed above, leads me to doubt his real motive in disciplining Rottinghouse. He and MacBride gave pretty detailed testimony about how improperly secured and/or nested cylinders posed such great risk of danger to the public. They claimed that the improperly loaded cylinders, as they appeared in Joint Exhibit 2, were at risk of falling down and off of Rottinghouse's truck. In fact, MacBride admitted that had he discovered the tilted cylinders, he would have tried to find the driver to correct them. I do not disagree that unsecured cylinders pose a potential risk of harm to the driver and others. However, I take great issue with the fact that Froslear allowed Rottinghouse to get out of his truck and go inside the facility without looking for him, while he was "concentrating" on getting his camera and taking a picture of the cylinders on the truck. (Tr. 39-41.) Next, he took pictures, but did not attempt to physically examine the cylinders to see if they were loose, movable or making noise when moved. Nor did he physically examine them to see how loose they or the straps around them were. Then, he went back inside the plant, and stood idly by, apparently watching to see what Rottinghouse would do next. Froslear also testified that he would not have let a driver return to the road with unsecured cylinders. However, his conduct suggests otherwise. There is no evidence which leads me to believe that, had Rottinghouse not straightened and re-secured the cylinders on his truck, Froslear would have run out to make him do so before he returned to the road.

Although counsel did not ask how Froslear could tell from a window inside the plant that Rottinghouse had properly nested

547 (2007); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

and secured cylinders, it is implausible that he would have been able to even make that assessment without going out to the truck, and looking at and/or physically examining them. In addition, given that Froslear described in such detail how Rottinghouse had not nested the cylinders, it is surprising that he never mentioned anything about nesting in his emails to MacBride, the warning letter or any of the subsequent meetings with Rottinghouse and the union representatives. He did not even require, in the warning letter, that Rottinghouse review training on securing or loading cylinders.

I have also discredited Froslear's testimony that he did not see Rottinghouse when they were both near Rottinghouse's truck. Overall, in my opinion, Froslear demonstrated that he was out to get Rottinghouse, and therefore more intent on catching and punishing him for reasons other than ensuring public safety or protecting Airgas from liability.

Regarding disparate treatment or departure from established discipline procedures, and contrary to Froslear's testimony, there is evidence that at least two other employees received verbal counselings for more serious DOT violations. I find that this departure, his inconsistent testimony regarding established discipline policy, as well as other factors leading to diminished credibility, create an inference of animus. His testimony regarding what he told employees in the April safety meetings was inconsistent with his Board affidavit testimony and with that of Luehrmann. He testified that he was establishing new discipline policy going forward, but the record shows that Respondent issued verbal counseling to employee Edger Reed in November 2013 for talking on the phone while driving—an infraction for which Reed and Respondent could have been subjected to large fines. I discredited Froslear's testimony that this was not a serious DOT violation, and found it alarming that he would not have considered a commercial truck driver driving along the highways while talking on the phone a serious DOT violation. It is certainly as potentially dangerous as a truck driving with slightly leaning cylinders, and both are DOT violations. Therefore, I find that Respondent departed from its stated policy for issuing written and verbal warnings. In addition, employee Jeffries received a verbal warning for a major preventable backing accident.

In that vein, Respondent denies disparate treatment on its part since it treated Rottinghouse and Huff the same in issuance of discipline. Huff received a written counseling and Rottinghouse a written warning, both deemed to be equal in magnitude. Froslear testified that the leaning cylinders on Rottinghouse's truck were just as dangerous as those on employee Huff's truck in 2011, in that they were at risk of coming completely loose and falling. As stated, Huff's cylinders included one fallen on its side, another pallet of liquid filled bottles with only one strap and another unsecured pallet. (GC Exh. 4, p. 1.) It is clear to me that the cylinders on Huff's truck posed a much greater risk of danger than those on Rottinghouse's truck. In fact, Respondent must have believed that to be the case since it mandated Huff to review DOT/Safecor and driver requirements for securing cylinders with his supervisor and ride with the driver trainer. In contrast, as mentioned earlier, Respondent only directed Rottinghouse to "take personal responsibility for creating and maintaining a safe environment," to properly se-

cure cylinders and follow other DOT/safety procedures.

I do not believe Froslear's testimony that he issued the warning letter as a form of progressive discipline. It was not a stated reason in the warning letter nor was it mentioned during the September 2 discipline meeting. In fact, Froslear's suspension was not noted at all. Instead, the first time that Froslear brought up Rottinghouse's first offense was during the second grievance meeting on September 23, and then only in response to Butts' claim that Rottinghouse believed he should have received a verbal warning since it was his first offense. If this was a sincere basis for issuing the discipline, I find that it would have been included in the warning letter and confirmed during the August 6 discipline meeting. Moreover, during the September 2 grievance meeting when Perkins told Froslear that Rottinghouse's warning should have been a verbal pursuant to CBA Article 22, Froslear responded that the contract necessitated a written warning notice for an employee's violation. This was not only inconsistent with other evidence that Respondent did not follow article 22 to the letter, but it was also contrary to Respondent's reducing employee Reed's discipline to a verbal counseling and Respondent's other reasons for issuing the warning letter—progressive discipline and the severity of the infraction. There is no doubt from the evidence presented, that Respondent had an established practice of issuing both verbal and written warnings, in writing and undocumented for various types of rule violations.

Finally, Froslear's out to get you attitude towards Rottinghouse is also supported by his email to MacBride, insistence that MacBride find the "strongest language" about securing cylinders and failure to conduct a meaningful investigation, as well as his made up story about seeing falling cylinders.

I have considered all of the arguments and case law offered by the General Counsel²² and Respondent, even that not specifically mentioned in this decision. Regarding Respondent's arguments regarding the omission of settlement agreement and pre-settlement conduct connected with his charge/Case 09-CA-152301, I find they are misplaced here. (R. Br. at 11-15.) The cases cited do not involve similar circumstances as in this case, and there is no need to engage in a detailed discussion of them. Moreover, the prior charge and pre-settlement conduct was only used in this case as evidence in connection with protected activity and credibility.²³ The Board has held that settlement agreements do not preclude consideration of pre-settlement statements or conduct as evidence shedding light on a respondent's subsequent discipline of a charging party. See *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995) (evidence of presettlement conduct admissible as background for respondent's motivation).

Therefore, based on the evidence as a whole, I conclude that the General Counsel has met its initial burden of persuasion

²² I dismiss the General Counsel's argument that the 3-day delay in issuing Rottinghouse's warning letter inferred animus, as I previously found that it was not unusual for Respondent to issue discipline several days after an offense occurred.

²³ As evidenced in this decision, I have dismissed Respondent's argument that Froslear's hearing and Board affidavit testimony in Case 09-CA-152301 was consistent; rather, it was anything but and raised suspicion about Froslear's motivation in this case. (R. Br. at 11-15.)

under *Wright Line* of showing through sufficient circumstantial evidence that Respondent's motivation for the written warning was motivated by his disdain for Rottinghouse's repeated charge filings with the Board.

D. Respondent Failed To Meet Its Burden of Showing That It Would Have Disciplined Rottinghouse In The Absence of His Protected Activity

First, I find that such shifting and inconsistent rationales, and incredibility, as set forth above support a finding that Froslear's reasons for disciplining Rottinghouse are pretextual. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014) (shifting reasons for an employer's adverse actions are not only persuasive evidence of discriminatory motive, but also serve as evidence of pretext); *Approved Electric Corp.*, 356 NLRB 238 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.")).

Moreover, my findings thus far regarding the factors leading to animus also undermine the Respondent's ability to rebut the General Counsel's prima facie case of unlawful discipline. Accordingly, I conclude that under a *Wright Line* analysis, the Respondent violated Section 8(a)(4) and (1) by issuing Rottinghouse a letter of warning.

CONCLUSIONS OF LAW

1. Respondent, Airgas USA, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing Charging Party, Steven Wayne Rottinghouse, Jr., a written warning on August 6, 2015, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(4) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall make Rottinghouse whole by expunging from its files any reference to the unlawful letter of warning dated August 5, 2015, and issued to him on August 6, 2015.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Issuing discipline to employees, or otherwise discriminating against them, for giving affidavits, filing charges or otherwise participating in the National Labor Relations Board process.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful letter of warning, and within 3 days thereafter notify him in writing that this has been done and that the letter of warning will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to its employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 2015, the date of the letter of warning.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. July 7, 2016

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline employees or otherwise discriminate against them because they have provided an affidavit, filed a charge or otherwise participated in the National Labor Relations Board process.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right under Section 7 of the Act, as set forth at the top of this notice.

WE WILL, within 14 days from the date of this Order, rescind and remove from our files any and all references to the letter of warning dated August 5, 2015 and issued on August 6, 2015, to Steven Rottinghouse, Jr. and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the letter of warning will not be used against him in any way.

AIRGAS USA, LLC

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-158662 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570, or by calling (202) 273-1940.



No.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

AIRGAS USA, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR REVIEW

Airgas USA, LLC petitions the court for review of the Decision and Order of the National Labor Relations Board in *Airgas USA, LLC and Steven Wayne Rottinghouse, Jr.*, Case 09-CA-158662, issued on June 13, 2018, a copy of which is attached.

Dated: June 14, 2018

Respectfully submitted,

/s/ Michael C. Murphy

Michael C. Murphy

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Counsel for Petitioner

Airgas USA, LLC

CERTIFICATE OF SERVICE

I certify that on June 14, 2018, a true and correct copy of Petitioner's Petition for Review was served on the parties listed below by electronic mail and United States Mail:

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Deputy Associate General Counsel
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Steven Wayne Rottinghouse
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Dated: June 14, 2018

/s/ Michael C. Murphy

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

AIRGAS USA, LLC)	
)	No. 18-1686
Petitioner)	
)	
v.)	Board Case No.
)	09-CA-158662
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	

**CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

The National Labor Relations Board hereby cross-applies to the Court for enforcement of its Order issued against Airgas USA, LLC on June 13, 2018, in Board Case No. 09-CA-158662, reported at 366 NLRB No. 104. The Board seeks enforcement of its Order in full.

On June 14, 2018, the Petitioner, Airgas USA, LLC, filed a petition with this Court to review the same Board Order. The Court has jurisdiction over this cross-application pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e) and (f)), because the Petitioner is aggrieved by the Board's Order. Venue is proper in this Circuit because the Petitioner transacts business within the geographic boundaries of this Circuit.

/s/ Linda Dreeben
 Linda Dreeben
 Deputy Associate General Counsel
 NATIONAL LABOR RELATIONS BOARD
 1015 Half Street, SE
 Washington, DC 20570-0001
 (202) 273-2960

Dated at Washington, DC
this 9th day of July 2018

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

AIRGAS USA, LLC)	
)	No. 18-1686
Petitioner)	
)	
v.)	Board Case No.
)	09-CA-158662
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben
 Linda Dreeben
 Deputy Associate General Counsel
 NATIONAL LABOR RELATIONS BOARD
 1015 Half Street, SE
 Washington, DC 20570-0001
 (202) 273-2960

Dated at Washington, DC
 this 9th day of July 2018

SERVICE LIST

Airgas USA, LLC v. NLRB
Board Case No. 09-CA-158662

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Steven Wayne Rottinghouse, Jr. 4221 Harding Avenue Cincinnati, OH 45211	Charging Party
Garey E. Lindsay Director, NLRB Region 9 John Weld Peck Federal Building 550 Main Street, Room 3003 Cincinnati, Ohio 45202-3271	Regional Director